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No. 85-2U79-CFX Title: Laborers Health and Welfare Trust Funds for Northern California, et al., Petitioners  
Status: GRANTED v.  
Advanced Lightweight Concrete Co., Inc.

Docketed:  
June 16, 1986 Court: United States Court of Appeals  
for the Ninth Circuit

See also:  
86-262 Counsel for petitioner: Mickelson, Blythe, Roger, Michael B.  
Counsel for respondent: Ross, Mark S.

Entry Date Note Proceedings and Orders

1 Jun 16 1986 G Petition for writ of certiorari filed.  
2 Jul 14 1986 G Motion of National Coordinating Committee for  
Multiemployer Plans for leave to file a brief as amicus  
curiae filed.  
3 Jul 17 1986 G Motion of Laborers International Union of North America  
National (Industrial) Pension Fund for leave to file a  
brief as amicus curiae filed.  
4 Jul 19 1986 Brief of respondent Advanced Lightweight Concrete in  
opposition filed.  
5 Jul 21 1986 G Motion of Construction Laborers' Trust Funds for  
Southern California for leave to file a brief as amicus  
curiae filed.  
7 Jul 23 1986 DISTRIBUTED. September 29, 1986  
8 Jul 21 1986 X Brief amicus curiae of Carpenters Southern California  
Administrative Assn. filed.  
9 Oct 6 1986 P The Solicitor General is invited to file a brief in this  
case expressing the views of the United States. Justice  
Scalia OUT.  
10 Jan 30 1987 Brief amicus curiae of United States filed.  
11 Feb 4 1987 REDISTRIBUTED. February 20, 1987  
12 Feb 23 1987 Motion of National Coordinating Committee for  
Multiemployer Plans for leave to file a brief as amicus  
curiae GRANTED.  
13 Feb 23 1987 Motion of Laborers International Union of North America  
National GRANTED.  
14 Feb 23 1987 Motion of Construction Laborers' Trust Funds for  
Southern GRANTED.  
15 Feb 23 1987 Petition GRANTED.  
\*\*\*\*\*  
17 Mar 13 1987 Order extending time to file brief of petitioner on the  
merits until May 7, 1987.  
18 Mar 17 1987 G Motion of petitioners to dispense with printing the  
joint appendix filed.  
19 Mar 30 1987 Motion of petitioners to dispense with printing the  
joint appendix GRANTED.  
20 Apr 10 1987 Record filed.  
21 Apr 10 1987 Certified copy of transcript of records, 5 volumes, dox,  
received.  
22 Apr 9 1987 Brief amicus curiae of Carpenters Southern California filed.  
23 May 7 1987 Brief of petitioners Laborers Health & Welfare, et al.  
filed.

Entry	Date	Note	Proceedings and Orders
24	May 7 1987		Brief amicus curiae of Tri-STATE U.F.C.W. and Employers Benefit Fund filed.
25	May 7 1987 G		Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae filed.
26	May 7 1987		Brief amicus curiae of United States filed.
27	May 18 1987		Motion of National Coordinating Committee for Multiemployer Plans for leave to file a brief as amicus curiae GRANTED.
29	May 14 1987		Order extending time to file brief of respondent on the merits until July 6, 1987.
30	May 19 1987 G		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
31	Jun 1 1987		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
32	Jun 30 1987		Order further extending time to file brief of respondent on the merits until July 10, 1987.
33	JUL 10 1987 G		Motion of Chamber of Commerce of the U.S. for leave to file a brief as amicus curiae filed.
34	JUL 10 1987		Brief of respondent Advanced Lightweight Concrete in opposition filed.
35	JUL 10 1987 G		Motion of Associated General Contractors of America for leave to file a brief as amicus curiae filed.
36	JUL 20 1987		CIRCULATED.
37	Aug 26 1987		Motion of Chamber of Commerce of the U.S. for leave to file a brief as amicus curiae GRANTED.
38	Aug 26 1987		Motion of Associated General Contractors of America for leave to file a brief as amicus curiae GRANTED.
39	Aug 31 1987		SET FOR ARGUMENT. Tuesday, November 10, 1987. (4th case).
40	Nov 3 1987 X	Reply brief of petitioners Laborers Health & Welfare, et al. filed.	
41	Nov 10 1987		ARGUED.

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Supreme Court, U.S.  
FILED  
JUN 16 1986  
JOSEPH F. SPANIOL, JR.  
CLERK

No. -

In the Supreme Court  
OF THE  
**United States**

OCTOBER TERM, 1985

LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,

*Petitioners,*

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent.*

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Petition for a Writ of Certiorari To  
The United States Court of Appeals  
For The Ninth Circuit

---

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June 1986



**QUESTION PRESENTED**

Does a United States District Court have jurisdiction pursuant to Sections 502 and 515 of the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement as long as the employer has a duty under applicable labor-management relations law to make such contributions?

## **LIST OF PARTIES**

The parties to the proceedings below and before this Court are:

1. Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California, and Laborers Training and Retraining Trust Fund for Northern California;
2. Cement Masons Health and Welfare Trust Fund for Northern California, Cement Masons Vacation Trust Fund for Northern California, Cement Masons Pension Trust Fund for Northern California, and Cement Masons Apprenticeship and Training Trust Fund for Northern California; and
3. Advanced Lightweight Concrete Co., Inc.

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No. -

**In the Supreme Court  
OF THE  
United States**

**OCTOBER TERM, 1985**

**LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,**

*Petitioners,*

v.

**ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,**  
*Respondent.*

**Petition for a Writ of Certiorari To  
The United States Court of Appeals  
For The Ninth Circuit**



The Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California, and Laborers Training and Retraining Trust Fund for Northern California (hereinafter "Laborers Trust Funds" or "Trust Funds") and the Cement Masons Health and Welfare Trust Fund for Northern California, Cement Masons Vacation Trust Fund for Northern California, Cement Masons Pension Trust Fund for Northern California, and Cement Masons Apprenticeship and Training Trust Fund for Northern California (hereinafter "Cement Masons Trust Funds" or "Trust Funds") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 26, 1985.

#### **[OPINIONS BELOW]**

The opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 779 F.2d 497. That Court's order denying Petitioners' petition for rehearing and rejecting Petitioners' suggestion for rehearing *en banc* (Appendix C, *infra*) was filed on March 18, 1986. The order of the United States District Court for the Northern District of California (Appendix B, *infra*) was filed on July 30, 1984, and entered on July 31, 1984, and is not reported.

#### **JURISDICTION**

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 26, 1985. A timely petition for rehearing and suggestion for rehearing *en banc* was filed on January 9, 1986. On March 18, 1986, the petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed with this Court under 28 U.S.C. § 2101(c).

#### **STATUTES INVOLVED**

The relevant statutory provisions are:

- A. National Labor Relations Act, as amended, Sections 7 and 8, 29 U.S.C. §§ 157 and 158.

B. Labor Management Relations Act of 1947, as amended, Sections 301, 302 and 303, 29 U.S.C. §§ 185, 186 and 187.

C. Employee Retirement Income Security Act of 1974, as amended, Sections 502, 515, 4201, 4203, 4212, 4221 and 4301, 29 U.S.C. §§ 1132, 1145, 1381, 1383, 1392, 1401 and 1451.

D. Multiemployer Pension Plan Amendments Act of 1980, Sections 3, 306 and 104(2), 29 U.S.C. §§ 1001a, 1132(b)(2), 1132(g)(2), 1145 and 1381-1452.

Pertinent portions of these statutory provisions are reproduced at Appendix D, *infra*.

### **STATEMENT OF THE CASE**

The Laborers Trust Funds and the Cement Masons Trust Funds are multiemployer employee benefit plans established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208. The Laborers Trust Funds were created by a collective bargaining agreement and trust agreements between the Northern California District Council of Laborers (hereinafter "Laborers Union") and various multiemployer associations representing construction industry employers in collective bargaining with the Laborers Union. The Cement Masons Trust Funds were similarly created by the District Council of Plasterers and Cement Masons of Northern California (hereinafter "Cement Masons Union") and various multiemployer associations.

Advanced Lightweight Concrete Co., Inc. (hereinafter "Advanced Lightweight") was a signatory employer to the 1980-1983 Laborers' Master Agreement and to the 1980-1983 Cement Masons Master Agreement. The Laborers' Master Agreement and the Cement Masons Master Agreement incorporated by reference the Laborers Trust Agreements and the Cement Masons Trust Agreements respectively. The Laborers' Master Agreement and the Laborers Trust Agreements required Advanced Lightweight to make

monthly contributions to the Laborers Trust Funds on behalf of employees covered by the Laborers' Master Agreement and to submit to an audit of its books and records upon request of the Laborers Trust Funds. The Cement Masons Master Agreement and the Cement Masons Trust Agreements contained similar requirements. Advanced Lightweight remained bound to the 1980-1983 Laborers' Master Agreement and to the 1980-1983 Cement Masons Master Agreement during the express term of each of those agreements.

In a letter dated April 1, 1983, Advanced Lightweight advised the Laborers Union that Advanced Lightweight would not be bound by the Laborers' Master Agreement after June 15, 1983. In that same letter, Advanced Lightweight stated that it stood "ready and willing to meet with you as an individual employer for the purpose of collective bargaining with respect to any of our employees whom you are entitled to represent." Collective bargaining negotiations occurred between the Laborers Union and Advanced Lightweight after April 1, 1983. No impasse was reached in these negotiations prior to June 15, 1983. The relevant facts with respect to the Cement Masons Union are similar.

Despite the fact that no impasse had been reached in the negotiations with either the Laborers Union or the Cement Masons Union, Advanced Lightweight ceased making fringe benefit contributions to the Laborers Trust Funds and the Cement Masons Trust Funds after June 15, 1983. Advanced Lightweight also refused to permit an audit of its books and records which had been requested by the Laborers Trust Funds and the Cement Masons Trust Funds for the period after June 15, 1983. The Laborers Trust Funds and the Cement Masons Trust Funds filed suit in United States District Court to recover the unpaid fringe benefit contributions due and owing for the period June 16, 1983, to September 30, 1983, based on an estimated liability, and to compel Advanced Lightweight to submit to an audit of its books and records for the period January 1, 1983, to the present and to pay all contributions found to be due and owing. The Trust Funds contend that the basis for federal jurisdiction in the District Court is found in Sections 502 and 515 of ERISA, as amended, 29 U.S.C. §§ 1132 and 1145.

The question presented for review in this petition—whether or not a United States District Court has jurisdiction pursuant to Sections 502 and 515 of ERISA, as amended, 29 U.S.C. § 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement as long as the employer has a duty under applicable labor-management relations law to make such contributions—was the central issue in the courts below. The District Court granted Advanced Lightweight's motion for summary judgment and issued an order consisting of one sentence.

The Ninth Circuit held that the primary jurisdiction of the National Labor Relations Board (hereinafter "NLRB") preempts a trust fund's suit in district court under Sections 502 and 515 of ERISA, as amended, 29 U.S.C. §§ 1132 and 1145, to recover delinquent fringe benefit contributions accrued after a collective bargaining agreement has expired. 779 F.2d at 498. The decision below reiterated the rule that, following expiration of a collective bargaining agreement and during the period that an employer has a duty to bargain in good faith with the union that represents its employees, the employer is obligated to continue making fringe benefit contributions pursuant to the terms of the expired collective bargaining agreement, until the employer negotiates in good faith with the union and reaches either a new collective bargaining agreement or an impasse. Failure to make such contributions is an unfair labor practice in violation of Sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. §§ 158(a)(1), 158(a)(5) and 158(d). See *NLRB v. Southwest Security Equipment Corporation*, 736 F.2d 1332, 1337 (9th Cir. 1984), cert. denied, 105 S.Ct. 1854 (1985); *Peerless Roofing Co., Ltd. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981); *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981); *Producers Dairy Delivery Co., Inc. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981); *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970). See also *NLRB v. Katz*, 369 U.S. 736, 743 (1962). The Ninth Circuit emphasized that there was no bar to the Trust Funds' filing an unfair labor practice charge against Advanced Lightweight. 779 F.2d at 503.

Because the Ninth Circuit found "no persuasive evidence in either the plain words or legislative history of ERISA or the MPPAA that Congress intended section 515 to be an exception to the general rule of NLRB preemption for that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse" (*id.* at 505), the Ninth Circuit decided the matter by the application of what it termed an "accepted labor law principle": "When presented with a dispute that involves adjudicating conduct which 'is arguably within the compass of § 7 or § 8 of the NLRA,' a federal court must defer to the primary jurisdiction of the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959)." *Id.* at 504. The Ninth Circuit reasoned as follows:

. . . Advanced's failure to pay contributions after the master agreements' expiration is, at least, an arguable unfair labor practice. While admittedly the failure to pay may also violate section 515 of ERISA, adjudication of the merits depends entirely on the section 8(a)(5) determination. Without a section 8(a)(5) violation, there is no section 515 infraction. Making this underlying labor law determination is exclusively an NLRB matter. [Footnote omitted.]

*Id.* The Ninth Circuit accordingly affirmed the District Court's grant of summary judgment to Advanced Lightweight. *Id.* at 505.<sup>1</sup>

### REASONS FOR GRANTING THE WRIT

At issue in the instant case is a tension between rights and obligations under ERISA, as amended by the MPPAA, and under the NLRA. The Ninth Circuit resolved this tension in a manner that conflicts with decisions of this Court, deprives trustees of multi-employer employee benefit plans of remedies expressly provided by Congress to discourage contribution delinquencies, and requires such trustees to delegate their fiduciary duties (which the Court

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<sup>1</sup>The Third and Fifth Circuits and another panel of the Ninth Circuit have all recently reached the same result in similar cases. *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office*, 783 F.2d 919 (9th Cir. 1986). The Fifth and Ninth Circuits cited the decision below.

found so important in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. \_\_\_, 86 L.Ed.2d 447 (1985)) to collect delinquent contributions to the NLRB.<sup>2</sup> Plenary consideration of the matter by this Court is essential.

The question presented for review in this petition is of profound significance to the thousands of multiemployer employee benefit plans covered by ERISA and to the millions of employees and their dependents who are the beneficiaries of these plans. After the expiration of a collective bargaining agreement, employees commonly continue to work during the negotiations for a new agreement. Not infrequently, these negotiations may continue for months or even years. While the employer continues to adhere to the terms of the expired agreement, the multiemployer employee benefit plans continue to accept the contributions and to provide the benefits in precisely the same manner as they would under an extant agreement. But when the employer ceases making fringe benefit contributions, and the employees face the loss of vital benefits, the consequences to the financial integrity of the plans and the welfare of their beneficiaries can be severe. A readily available, certain, meaningful federal court remedy in such cases is not only envisioned by the comprehensive statutory scheme, language, legislative history and policies of ERISA, as amended by the MPPAA, but also absolutely necessary if the trustees, in the discharge of their fiduciary duties to assure the financial integrity of multiemployer employee benefit plans, are to have an effective avenue of redress.

**I. The Policies, Language, Legislative History and Comprehensive Statutory Scheme of ERISA, as Amended by MPPAA, Indicate that Section 515 Encompasses Suits by Multiemployer Employee Benefit Plans To Collect Post-Contract Expiration Contribution Delinquencies.**

Each of the Trust Funds was created by a written trust agreement pursuant to Section 302(c)(5) of the LMRA, 29 U.S.C. § 186(c)(5). Although Section 302 generally prohibits an employer from making

<sup>2</sup>The Trust Funds respectfully urge the Court to invite the filing of a brief by the United States to aid the Court in its consideration of this petition. The decision below will have an impact on the NLRB. NLRB Chairman Dotson has already referred to the NLRB's "heavy workload" and expressed displeasure with the involvement of the NLRB in delinquency collection. *Rapid Fur Dressing, Inc.*, 278 N.L.R.B. No. 126 (1986) (Dotson, dissenting).

payments to any representative of its employees, Section 302(c)(5) allows an employer to contribute to a trust fund that satisfies certain statutory requirements, including, *inter alia*, that "the detailed basis on which such payments are to be made is specified in a written agreement with the employer." 29 U.S.C. § 186(c)(5)(B). This requirement is a restriction on possible abuse in the administration of the fund. *See NLRB v. Amax Coal Company*, 453 U.S. 322 (1981).

Prior to 1974, district court jurisdiction of suits for delinquent contributions was predicated exclusively on Section 301 of the LMRA, 29 U.S.C. § 185. *See, e.g., Lewis v. Benedict Coal Corporation*, 361 U.S. 459 (1960). For years, the Trust Funds operated within the context of the LMRA. All that changed profoundly when Congress enacted ERISA in 1974, and later the MPPAA in 1980, which amended ERISA.<sup>3</sup>

The MPPAA amendments to ERISA were prompted by Congressional concern that the financial health of multiemployer pension plans was in decline and that the maintenance and growth of such plans was being discouraged. *See MPPAA § 3*, 29 U.S.C. § 1001a. *See generally H.R. Rep. No. 869 (Part I)*, 96th Cong., 2d Sess. (1980). Congress recognized that "the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans," and sought by

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<sup>3</sup>ERISA is a "comprehensive and reticulated statute" designed to protect the benefit expectations of participants and beneficiaries of private pension and welfare plans, including multiemployer plans. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981), quoting *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980); 29 U.S.C. § 1001(a). Finding that the private employee benefit plan system is "affected with a national public interest" in providing for the "well-being and security of millions of employees and their dependants," 29 U.S.C. § 1001(a), Congress established the regulation of private employee benefit plans as exclusively a federal concern. *Alessi*, 451 U.S. at 523. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). ERISA sets reporting and disclosure requirements, imposes minimum standards for employee participation, vesting, benefit accrual, plan funding, and plan fiduciary conduct, provides for civil and criminal enforcement of its provisions, and creates a termination insurance program to protect plan participants against loss of specified benefits upon plan termination. *See Shaw*, 463 U.S. at 91; *Nachman*, 446 U.S. at 361 n.1; *Alessi*, 451 U.S. at 510 n.5. Congress declared that the policy of ERISA is to "protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries . . . by providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. § 1001(b).

directly affected by multiemployer pension plans," and sought by enacting MPPAA to enhance the financial stability of such plans and to foster their maintenance and growth. 29 U.S.C. § 1001a. See also *Amax Coal*, 453 U.S. at 338 n.22. Congress also recognized that the financial instability of multiemployer plans was attributable in substantial part to the failure of employers to make full and timely contributions to such plans. Section 306(a) of MPPAA added Section 515 to ERISA, 29 U.S.C. § 1145, which provides:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The language of Section 515 of ERISA offers a clear indication of Congress' intent to require strict observance of the "terms of a collectively bargained agreement" where those terms provide that the "employer . . . is obligated to make contributions to a multiemployer plan" unless observing the terms of the agreement is "inconsistent with law." Section 306(b)(2) of MPPAA added Section 502(g)(2) to ERISA, 29 U.S.C. § 1132(g)(2), which provides for mandatory awards of interest, liquidated damages, and attorneys' fees to multiemployer plans when judgment is entered in their favor in an action to enforce Section 515 of ERISA.<sup>4</sup>

The paramount concern of Congress in enacting Sections 502(g)(2) and 515 of ERISA was to promote the prompt payment of contributions and to assist multiemployer plans in recovering both

<sup>4</sup>Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), affords a basis for district court jurisdiction over violations of Section 515. 779 F.2d at 501 n.7; *Laborers Health and Welfare Trust Fund v. Hess*, 594 F.Supp. 273, 278 (N.D. Cal. 1984). Section 502(a)(3) provides:

A civil action may be brought— . . . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . .

Section 515 of ERISA, 29 U.S.C. § 1145, is a "provision of this subchapter" within the meaning of Section 502(a)(3) of ERISA.

delinquent contributions and the costs incurred in connection with such delinquencies in order to lessen the serious financial impact of delinquencies on multiemployer plans:

*Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans.* Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.

These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.

Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

The public policy of this legislation to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection . . . A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, and double interest on the contributions owed. The intent

of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.

Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S.1076, *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* 43-44 (Comm. Print 1980) (emphasis added). The Senate Labor Committee's explanation of the overall purpose of Sections 502(g)(2) and 515 was later reaffirmed by the legislation's sponsors, Representative Thompson and Senator Williams. See 126 Cong. Rec. 23039 (1980) (statement of Rep. Thompson); *id.* at 23288 (statement of Sen. Williams); *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 87 (1982); *Central Transport*, 86 L.Ed.2d at 464 n.22.

In addition to addressing the problem of delinquent contributions, the MPPAA, *inter alia*, added to ERISA provisions for the assessment of withdrawal liability<sup>5</sup> on employers which completely or partially terminate their participation in multiemployer defined benefit pension plans under certain circumstances. MPPAA § 104(2), 29 U.S.C. §§ 1381-1405. Congress expressly provided in the MPPAA that the NLRB is *not* the exclusive forum for determining whether or not an employer has a post-contract expiration obligation under the NLRA to continue making contributions to a

<sup>5</sup>According to the Court in *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717, 725 (1984):

As enacted, the [MPPAA] requires that an employer withdrawing from a multiemployer pension plan pay a fixed and certain debt to the pension plan. This withdrawal liability is the employer's proportionate share of the plan's "unfunded vested benefits," calculated as the difference between the present value of vested benefits and the current value of the plan's assets. 29 U.S.C. §§ 1381, 1391.

Like the collection of delinquent contributions, the collection of withdrawal liability from employers was considered by Congress to be "central to this legislation." 126 Cong. Rec. 20180 (1980). See *id.* at 23039. Congress found that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations . . ." MPPAA § 3(a)(4)(A), 29 U.S.C. § 1001a(a)(4)(A). See generally H.R. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980).

multiemployer pension plan. An employer which permanently ceases to have an "obligation to contribute" may be assessed withdrawal liability. ERISA § 4203, as added by MPPAA § 104(2), 29 U.S.C. § 1383.<sup>6</sup> The definition of "obligation to contribute" includes a duty imposed by the NLRA.<sup>7</sup> As a result, in determining whether an employer has withdrawn from a multiemployer pension plan and has withdrawal liability, one must decide whether or not the employer continues to be obligated under the NLRA to contribute. Who makes this decision under the MPPAA? Not the NLRB. The trustees of the plan make this decision in the first instance (ERISA § 4219, as added by MPPAA § 104(2), 29 U.S.C. § 1399), then, if necessary, an arbitrator (ERISA § 4221(a), as added by MPPAA § 104(2), 29 U.S.C. § 1401(a)), and ultimately, if necessary, a federal district court (ERISA § 4221(b), as added by MPPAA § 104(2), 29 U.S.C. § 1401(b); ERISA § 4301, as added by MPPAA § 104(2), 29 U.S.C. § 1451). To the extent that the Court may want to avoid stepping over the line into the NLRB's jurisdiction, Congress has, in the MPPAA amendments to ERISA, obliterated the line. The withdrawal liability provisions of MPPAA have already encroached upon the NLRB's jurisdiction, and there is no practical sense in making a distinction in this regard between suits to collect delinquent contributions and to collect delinquent withdrawal liability payments. Since the federal district courts must decide in the context of withdrawal liability litigation when the contribution obligation imposed by the NLRA ceases, it should be no great imposition on federal labor policy for the courts to decide the same issue in the context of contribution delinquency litigation under Section

<sup>6</sup>Under ERISA, as amended by the MPPAA, "[i]f an employer withdraws from a multiemployer plan in a complete withdrawal . . . then the employer is liable to the plan in the amount determined . . . to be the withdrawal liability." ERISA § 4201(a), as added by MPPAA § 104(2), 29 U.S.C. § 1381(a). "The term 'complete withdrawal' means a complete withdrawal described in section 1383 of this title." ERISA § 4201(b)(2), as added by MPPAA § 104(2), 29 U.S.C. § 1381(b)(2). "[A] complete withdrawal from a multiemployer plan occurs when an employer—  
(1) permanently ceases to have an obligation to contribute under the plan, or  
(2) permanently ceases all covered operations under the plan." ERISA § 4203(a), as added by MPPAA § 104(2), 29 U.S.C. § 1383(a).

<sup>7</sup>The term "obligation to contribute" is defined as "an obligation to contribute arising . . . (1) under one or more collective bargaining (or related) agreements, or  
(2) as a result of a duty under applicable labor-management relations law." ERISA § 4212(a), as added by MPPAA § 104(2), 29 U.S.C. § 1392(a) (emphasis added).

515. That Congress so intended is evinced by the MPPAA amendments to ERISA which expressly provide that suits to collect withdrawal liability are to be treated in the same manner as suits to collect delinquent contributions under Section 515. ERISA § 4221(d), as added by MPPAA § 104(2), 29 U.S.C. § 1401(d); ERISA § 4301(b), as added by MPPAA § 104(2), 29 U.S.C. § 1451(b).

The Trust Funds have advanced the position set forth in *Laborers Health and Welfare Trust Fund v. Hess*, 594 F. Supp. 273 (N.D. Cal. 1984), that the phrase "obligated to make contributions" which appears in Section 515 includes an obligation to contribute arising as a result of Section 8(a)(5) of the NLRA, as amended, 29 U.S.C. § 158(a)(5). This position is based on the definition of "obligation to contribute" in 29 U.S.C. § 1392(a)(2). As the court explained in *Hess*, 594 F. Supp. at 279 n.6, the definition of "obligation to contribute" in 29 U.S.C. § 1392(a) should be read into Section 515:

"It is true that the definition of obligation to contribute in section 1392 states that the definition is '[f]or purposes of this part,' evidently referring to Part I—'Employer Withdrawals,' which is only one of three parts of Subtitle E, 'Special Provisions for Multiemployer Plans . . .'" *Schulze*, 564 F. Supp. at 1294 n.4. "No other definition of obligation to contribute is found anywhere in ERISA, however. There is no reason to believe that Congress intended to create any discontinuity between the employer withdrawal part of the Act and the other contexts in which the question of obligation to contribute might arise." *Id.* Thus, it makes sense to apply the definition of section 1392 when interpreting the phrase "obligated to make contributions" in section 515.

Statements in the Congressional Record by the legislation's sponsors support the position of the Trust Funds and *Hess* in this regard. Both sponsors of the legislation stated that "[t]he bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans." 126 Cong. Rec. 23039 (1980) (statement of Rep. Thompson); *id.* at 23288 (statement of Sen. Williams).

Contrary to *Hess* and the position of the Trust Funds, the Ninth Circuit concluded that the obligation to pay the contributions

required by Section 515 of ERISA must arise under an extant agreement (as opposed to a statute such as Section 8(a)(5) of the NLRA) in order to create district court jurisdiction. The only explanation that the Ninth Circuit gave for its refusal to adopt the definition of "obligation to contribute" contained in the withdrawal liability provisions of ERISA was the conclusory statement that "a more plausible conclusion is that Congress intended withdrawal liability to be more broadly based than employer's general liability for ERISA violations." 779 F.2d at 502. The Ninth Circuit offered no reason why Congress would want to create a discontinuity between the withdrawal liability part of ERISA and the other contexts in which the question of obligation to contribute might arise. See *I.A.M. National Pension Fund v. Schulze Tool and Die Co., Inc.*, 564 F. Supp. 1285, 1294 n.4 (N.D. Cal. 1983); *Hess*, 594 F. Supp. at 279 n.7. That Congress intended such a discontinuity is implausible since the date of withdrawal and the cessation of an employer's obligation to make contributions are conceptually and statutorily intertwined. *Schulze*, 564 F. Supp. at 1289.

The Ninth Circuit's recent decision in *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1986), provides a clear example of the interconnection between the date of withdrawal and the cessation of the post-contract expiration obligation to make contributions. In *Woodward*, a multiemployer pension fund sought to collect withdrawal liability. The existence of withdrawal liability turned on whether or not the employer (Woodward) had an obligation to contribute under the plan on or after September 26, 1980 (the effective date of the withdrawal liability provisions) as a result of a duty under applicable labor-management relations law.<sup>8</sup> Relying on *Producers Dairy*, 654 F.2d at 627, the Ninth Circuit noted that Woodward was required to make pension fund contributions until negotiations reached an impasse. The Ninth Circuit determined that the critical issue in *Woodward* was whether or not an impasse had been reached, and instructed the district court to decide on remand whether or not an impasse in negotiations had been reached between the two parties and, if so, whether that impasse was reached before or after

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<sup>8</sup>The collective bargaining agreement between Woodward and the union had expired on August 15, 1980.

September 26, 1980. These same issues concerning the existence and timing of an impasse in negotiations would be presented in an action under Section 515 of ERISA to collect post-contract expiration delinquent contributions.

The result in *Woodward* is consistent with the district court's decision to resolve the impasse issue in *Schulze*. In *Schulze*, the trust fund brought an action against the employer to collect both unpaid contributions and withdrawal liability. 564 F.Supp. at 1287. The employer in *Schulze* made contributions to the trust fund after the expiration of the collective bargaining agreement, and then ceased payments. *Id.* at 1288. The *Schulze* court decided that the statutory phrase "obligation to contribute arising . . . as a result of a duty under applicable labor-management relations law" (29 U.S.C. § 1392(a)(2)) incorporates the impasse concept developed under the NLRA. *Id.* at 1296. It concluded that the date that an employer's obligation to contribute to the plan ceased is the same for purposes of determining both liability for contributions and an employer's withdrawal date. *Id.* at 1294 n.4. With respect to the facts before it, the court concluded that "if *Schulze* reached impasse in its negotiations with the IAM and took definite steps to implement its prior position that it would no longer participate in the Plan, then at that point it permanently ceas[ed] to have an obligation to contribute to the Plan and, therefore, withdrew." *Id.* at 1296. The *Schulze* court found that an impasse had been reached by the time *Schulze* ceased making contributions to the plan. *Id.* at 1297-98. Because the impasse relieved *Schulze* of any outstanding obligation to contribute to the trust fund, the district court rejected the trust fund's claim for delinquent contributions.

In the opinion below, the Ninth Circuit recognized that "[t]he district court's decision to resolve the impasse issue in *Schulze* is clearly at odds with our conclusion here that the primary jurisdiction of the NLRB preempts a § 515 suit to recover unpaid contributions after a collective agreement has expired." 779 F.2d at 501 n.6. The decision below is also clearly at odds with the decision of the Ninth Circuit panel in *Woodward*, which instructed the district court to decide on remand the critical issue of whether or not an impasse had been reached. The existence of this intracircuit conflict is another factor weighing in favor of granting a writ of certiorari in the

instant case. See, e.g., *John Hancock Mutual Life Insurance Company v. Bartels*, 308 U.S. 180, 181 (1939); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 508 (1950); *Maggio v. Zeitz*, 333 U.S. 56, 59-60 (1948).

The construction of Section 515 by the court below makes the jurisdictional scope of Section 515 no different from that of Section 301 of the LMRA with respect to the collection of delinquent contributions.<sup>9</sup> As a result, Section 515, as construed by the Ninth Circuit, adds nothing to Title 29 of the United States Code. This result is contrary to both the established rules of statutory construction and Congress' desire in enacting Section 515 to facilitate the collection of delinquent contributions in order to protect the financial integrity of the multiemployer employee benefit plans upon which so many working people rely.

"It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute." A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . [Footnotes omitted.]

Sutherland Statutory Construction § 46.06 (4th ed.) at 104. "Where different words are used in different parts of a statute, they are presumed to have different meanings." *Id.* at 108 n.1. Section 515 contains language which is entirely different from that of Section 301. Nevertheless, the Ninth Circuit's reading of Section 515 has made the jurisdictional breadth of Section 515 and Section 301 exactly the same with respect to the collection of delinquent contributions. As a result, the decision below ignores the statutory construction maxim that the legislature does not enact superfluous, repetitive legislation.

The Ninth Circuit commits the same errors when it adopts the reasoning of the district court in *Mo-Kan Teamsters Pension Fund v.*

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<sup>9</sup>In *Cement Masons Health and Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F. Supp. 942 (N.D. Cal. 1981), aff'd for the reasons stated in the district court's opinion, 692 F.2d 641 (9th Cir. 1982), the district court held that there was no jurisdiction under Section 301 of the LMRA over a suit to collect unpaid fringe benefit contributions owing to an employee benefit plan for the period after the expiration of the collective bargaining agreement.

*Botsford Ready Mix Co.*, 605 F. Supp. 1441 (W.D. Mo. 1985): “[a]s *Botsford* properly observes, there is no reason to believe that Congress would use ‘an ambiguous, metaphysical concept to define an obligation [in section 515] when it has used a crystal clear definition elsewhere [in section 1392] in the same act.’ 605 F. Supp. at 1445.” 779 F.2d at 502. Also following *Botsford*, the Ninth Circuit pointed to what it claimed to be “the similarity between the phraseology in section 515 and that in section 1392(a)(1) (‘obligation to contribute arising . . . under one or more collective bargaining . . . agreements’)” in order to “reinforce the conclusion that Congress intended section 515 liability to be less extensive than withdrawal liability.” *Id.* By adopting the *Botsford* approach, the Ninth Circuit failed to recognize, in stressing the similarity between the two sections, the *difference*: when Congress meant to say “under one or more collective bargaining agreements” and thereby limit the definition of “obligation to contribute” to obligations arising under an extant agreement, Congress knew perfectly well how to do so and did just that in 29 U.S.C. § 1392(a)(1). Congress’ use of the phrase “obligated to make contributions to a multiemployer plan *under the terms*” of a collective bargaining agreement in 29 U.S.C. § 1145, which is different language from that found in 29 U.S.C. § 1392(a)(1), establishes the Congressional intent to have two different meanings. Section 515 specifically requires an employer to make contributions where the employer is obligated to do so “under the terms of the plan or under the terms of a collectively bargained agreement,” which includes the situation where the terms of the plan or agreement have been extended by operation of law (for example, Section 8(a)(5) of the NLRA).<sup>10</sup>

Finally, the opinion below fails to recognize the relationship between Section 302(c)(5) of the LMRA (requirement of a “detailed basis” for contributions “specified in a written agreement”)<sup>11</sup> and

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<sup>10</sup>As noted in the opinion below, the terms of an expired collective bargaining agreement define the parameters of the employer’s obligation under Section 8(a)(5) of the NLRA, as amended, 29 U.S.C. § 158(a)(5), to maintain the status quo until the duty to bargain ceases. 779 F.2d at 500. See *Producers Dairy*, 654 F.2d at 627.

<sup>11</sup>As discussed *supra*, Section 302(c)(5)’s requirement that the “detailed basis” for contributions be “specified in a written agreement” relates to the *terms* of the agreement and provides one of several safeguards with respect to the administration of the fund.

Section 515 in interpreting the language of the latter. The language of Section 515 ("obligated to make contributions . . . under the terms") reflects the language of Section 302(c)(5) of the LMRA ("the detailed basis" on which contributions are to be made must be "specified in a written agreement"). The operative words of Section 515 are "obligated to make contributions"; the reference to "under the terms of" the plan or the collective bargaining agreement merely echoes the restrictive language of Section 302(c)(5) of the LMRA in recognition of the need for a detailed and written set of rules governing the contributions in order to avoid abuse in the administration of the fund.

The Ninth Circuit's demarcation of the scope of Section 515 removes post-contract expiration collection actions from the enforcement scheme of ERISA, as amended by the MPPAA. Under the Ninth Circuit's reading of Section 515, multiemployer plans will be forced to litigate the same continuing delinquency in two separate forums; they will be required to file both an action in district court for fringe benefit contributions due through the expiration date of the collective bargaining agreement and a second, separate charge with the NLRB for fringe benefit contributions due after the expiration date of the agreement. Congress could not possibly have intended such a bifurcated procedure when it enacted the MPPAA amendments to ERISA. The MPPAA amendments, which added Sections 515 and 502(g)(2) to ERISA, reflect Congressional recognition of the importance of delinquency collection to the overall financial health of multiemployer plans. Removal of post-contract expiration collection actions from the enforcement scheme of ERISA, as amended by the MPPAA, would, therefore, be contrary to the Congressional policies embodied in the MPPAA amendments to ERISA.

Thus, the policies, language, legislative history and comprehensive statutory scheme of ERISA, as amended by the MPPAA, and the established rules of statutory construction all compel the conclusion that a district court has jurisdiction pursuant to Sections 502 and 515 of ERISA over suits to collect fringe benefit contributions owing under expired collective bargaining agreements.

## II. NLRB Proceedings Do Not Provide Trustees With Adequate Means to Fulfill Their Fiduciary Duties of Assuring the Financial Integrity of Multiemployer Employee Benefit Plans.

The Ninth Circuit's conclusion that Section 515 does not provide a basis for district court jurisdiction in the instant case is predicated on the Ninth Circuit's assumption that the NLRB will be an adequate avenue of redress for trust funds. 779 F.2d at 503-04 & n.13. The inaccuracy of this assumption becomes readily apparent upon a review of the differences between ordinary NLRB matters and trust fund delinquency collection actions. While the NLRB unfair labor practice procedures may be effective in resolving union and management labor relations disputes and in contributing to labor peace—the purposes for which the NLRB was created—such procedures will very likely hamstring the trustees in fulfilling their fiduciary duties of assuring the financial integrity of the plans for their beneficiaries by promptly collecting delinquent contributions. *See Central Transport*, 86 L.Ed.2d at 459-62, 464; *Amax Coal*, 453 U.S. at 334-37 ("The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by § 302(c)(5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure").

As discussed *supra*, ERISA, and especially the MPPAA amendments thereto, reflect Congressional concern for assuring the financial integrity of employee benefit plans and holding employers to the full and prompt fulfillment of their contribution obligations. *See, e.g., Central Transport*, 86 L.Ed.2d at 460. "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries . . ." *Id.* at 458. In *Central Transport*, the Court reiterated the "trustee responsibility for assuring full and prompt collection of contributions owed to the plan." *Id.* at 459.<sup>12</sup>

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<sup>12</sup>In *Central Transport*, 86 L.Ed.2d at 460, the Court noted:

The Secretary of Labor has explicitly interpreted the trustees' duty to prevent employer use of trust assets as . . . requiring plans to adopt systems for policing employers . . . In the Department's view, plans "which do not establish and implement [such] collection procedures" may "by failing to collect delinquent contributions" be found to have violated § 406's prohibi-

The Court rejected in *Central Transport* the argument that trust funds should rely on federal government agencies to police employer compliance as an alternative to direct action by the trust funds:

There are also compelling reasons why the Department of Labor's power to police employer compliance must be rejected as an alternative to audits by the plans themselves. Indeed, *the structure of ERISA makes clear that Congress did not intend for government enforcement powers to lessen the responsibilities of plan fiduciaries.*

First, the Department of Labor denies that it has the resources for policing the day-to-day operations of each multi-employer benefit plan in the Nation. The United States, as amicus, informs us that approximately 900,000 benefit plans file annual reports with the Secretary of Labor, and that between 11,000 and 12,000 of these are multiemployer plans. As the petitioners' situations illustrate, some multiemployer plans can be quite large. . . . It is therefore not surprising that the United States argues that "[i]t is thus wholly unrealistic to suggest that centralizing all auditing authority in the Secretary would provide protection to benefit plan participants comparable to that afforded by trustee audits . . . ."

Second, although ERISA grants the Secretary of Labor broad investigatory powers, *see, e.g.*, 29 U.S.C. §1134, neither the structure of the Act nor the legislative history show any congressional intent that plans should rely primarily on

tion of extensions of credit to employers. Prohibited Transaction Exemption 76-1, 41 Fed. Reg. 12740, 12741 (1976); *accord*, Department of Labor Advisory Op. No. 78-28A (Dec. 5, 1978) . . . .

In defining the scope of the fiduciary duties of employee benefit plan trustees, the Third Circuit has held that the trustees are required "to take action against employers who fail to contribute to the fund as required by the plan." *Rosen v. Hotel and Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 (3d Cir.), *cert. denied*, 454 U.S. 898 (1981). In *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416 (9th Cir. 1983), the Ninth Circuit recognized that "pension plan trustees have a fiduciary duty to maintain the financial security of the trust, [citation omitted] and that at some point failure to attempt to collect pension contributions may result in a breach of the trustee's statutory fiduciary duty of care and diligence in administering the plan." *See also* Sections 404(a)(1) and 405(c) of ERISA, 29 U.S.C. §§1104(a)(1) and 1105(c).

centralized federal monitoring of employer contribution requirements. Indeed, Congress expressly withheld from the Secretary the authority to initiate actions to enforce an employer's contribution obligations. See 29 U.S.C. §§ 1132(b)(2), 1145. In contrast, as we have noted, trustees were given the authority to sue to enforce an employer's obligations to a plan. § 1132. [Emphasis added.]

*Id.* at 462-63.<sup>13</sup> It would be contrary to the rationale set forth in *Central Transport* for trust funds to be forced to rely on the NLRB to enforce employers' contribution obligations. *Central Transport* teaches that trustees cannot delegate their obligation to collect contributions. In addition, unfair labor practice proceedings before the NLRB will *not* provide protection to benefit plan participants and beneficiaries comparable to that afforded by federal court litigation under Section 515 of ERISA.

The NLRB operates under a number of jurisdictional and procedural limitations in unfair labor practice proceedings which would severely undermine the efforts of trust funds to collect delinquent contributions. *First*, the NLRB declines to exercise jurisdiction over non-retail enterprises where the gross inflow or outflow of goods affecting interstate commerce is less than \$50,000. See *Culligan Soft Water Service*, 149 N.L.R.B. 2 (1964).

*Second*, the NLRB will not remedy any conduct occurring more than six months prior to the filing of the unfair labor practice charge with the NLRB. See § 10(b) of the NLRA, 29 U.S.C. § 160(b).<sup>14</sup> By contrast, a federal court action under ERISA to collect delinquent contributions is governed by the most applicable statute of limitations of the forum state since ERISA does not specify one. See *Miles v. New York State Teamsters Conference Pension and Retirement*

<sup>13</sup>Section 306(b)(1) of MPPAA added Section 502(b)(2) to ERISA, 29 U.S.C. § 1132(b)(2), which provides: "The Secretary shall not initiate an action to enforce section 1145 of this title."

<sup>14</sup>Denying district court jurisdiction to the Trust Funds will in all likelihood prejudice their claims against Advanced Lightweight. The Trust Funds have maintained throughout this litigation that no impasse was reached prior to June 15, 1983, when Advanced Lightweight stopped making contributions. Any NLRB charge by the Trust Funds at this time would in all likelihood be time-barred, and, if not time-barred, any remedy would be limited to the six-month period immediately preceding the filing of the charge.

*Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir.), cert. denied, 464 U.S. 829 (1983); *Jenkins v. Local 705 International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). See also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975). In California, the statute of limitations for actions for breach of a statutory duty is three years. Cal. Civ. Proc. Code § 338 (Deering 1986). Trust funds rely on the self-reporting of employers or on audits of the employer's payroll and personnel records to determine whether contributions are due. *Central Transport*, 86 L.Ed.2d at 453. A six-month limitation, while arguably appropriate where the union or employer will have first-hand knowledge of the actions constituting an unfair labor practice, would be a profound restriction on trust funds, which ordinarily do not have an ongoing, day-to-day working relationship with the employer.<sup>15</sup>

Third, the investigation, issuance of complaint, prosecution and enforcement with respect to the unfair labor practice is entirely within the control of the General Counsel of the NLRB. See 29 U.S.C. §153(d); 29 C.F.R. §§101.2, 101.4, 102 et seq. The trustees would have no control over the decision to issue the complaint, or the discovery, timing and tactical and strategic decisions involved. They would, in short, be at the mercy of the General Counsel who, unlike the trustees, has no fiduciary duties under ERISA and whose discretion in exercising its jurisdiction over unfair labor practices is subject to very few limitations. See, e.g., *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint"); *Baker v. International Alliance of Theatrical Stage Employees*, 691

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<sup>15</sup>Any notion that trustees can rely on unions to enforce an employer's obligations to an employee benefit plan did not survive the Court's decisions in *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364 (1984), and *Central Transport*, where the Court concluded:

[C]ompelling benefit plans to rely on unions would erode the protections ERISA assures to beneficiaries, for the diminishment of trustee responsibility that would result would not necessarily be made up for by the union. ERISA places strict duties on trustees with respect to the interests of beneficiaries, and unions' duties toward beneficiaries are of a quite different scope.

*Central Transport*, 86 L.Ed.2d at 461.

F.2d 1291, 1297 (9th Cir. 1982) ("nothing in it [the NLRA, as amended] requires the General Counsel to issue complaints upon the finding of a violation . . . his statutory authority is permissive."); *International Association of Machinists v. Lubbers*, 681 F.2d 598, 603 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983) ("the General Counsel's prosecutorial decisions are not subject to review by the Board or by a court"). Indeed, in a recent dissent, NLRB Chairman Dotson referred to the NLRB's "heavy workload" and criticized the use of unfair labor practice proceedings to collect delinquent fringe benefit contributions *Rapid Fur Dressing, Inc.*, 278 N.L.R.B. No. 126 (1986) (Dotson, dissenting). See, e.g., *Can-Do, Inc.*, 279 N.L.R.B. No. 108 (1986) (Dotson, dissenting); *Can-Do, Inc.*, 279 N.L.R.B. No. 111 (1986) (Dotson, concurring in part and dissenting in part).<sup>16</sup>

*Fourth*, even should the trust funds prevail in an unfair labor practice proceeding before the NLRB, they will *not* receive the attorneys' fees and double interest on unpaid contributions that they would have been awarded by a district court if a judgment had been entered in their favor in an action to enforce Section 515 of ERISA. See 29 U.S.C. §1132(g)(2); *Lads Trucking Company v. Board of Trustees*, 777 F.2d 1371, 1373 (9th Cir. 1985); *Winterrowd v. David Freedman and Company, Inc.*, 724 F.2d 823, 827 (9th Cir. 1984). "The regulatory scheme established for labor relations by Congress is 'essentially remedial,' and the [NLRB] is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940)." *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. \_\_\_, 89 L.Ed.2d 223, 229 n.5 (1986). By contrast, the mandatory double interest provisions which the MPPAA added to ERISA, 29 U.S.C. §1132(g)(2)(B) and (C), "fulfill most of the usual functions of punitive damages in deterring misconduct and ensuring compliance." *Winterrowd*, 724 F.2d at 827. In addition, unlike the NLRB, a district court may, in certain

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<sup>16</sup>In *Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1183 (11th Cir. 1985), the Eleventh Circuit concluded that neither the Board of Trustees of an employee benefit plan nor the individual Trustees had standing to bring an unfair labor practice charge against the employer.

circumstances, award punitive damages in actions to recover unpaid employer contributions under Section 515 of ERISA. *Id.* at 826-27.

*Fifth*, unilateral settlements in unfair labor practice cases may be entered into by the NLRB and the charged party despite objections by the charging party. See 29 C.F.R. § 101.9(c). See, e.g., *Botsford*, 605 F. Supp. at 1444. Finally, NLRB negotiated settlements may compromise contribution obligations in exchange for employer concessions in other areas. *Id.* (settlement in an amount equal to 80% of the contributions that should have been paid).

The foregoing makes clear that the NLRB is *not* an adequate avenue of redress for trust funds with respect to the collection of delinquent contributions. In situations where the NLRB, for whatever reason (including reasons unrelated to the merits of the claim), refuses to prosecute, multiemployer employee benefit plans will have *no available forum* in which to collect post-contract expiration contribution delinquencies under the Ninth Circuit's reading of Section 515.<sup>17</sup> Such a result is contrary to *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416 (9th Cir. 1983), where the Ninth Circuit noted: "[w]e are persuaded by both the structure and purpose of ERISA that Congress would not impose upon the Funds' trustees a fiduciary duty to maintain the fiscal integrity of the trusts without providing them a forum in which to do so."<sup>18</sup> And, even where the NLRB decides to prosecute, trust funds may very well *not* receive a settlement or NLRB order in an amount equal to 100% of the contributions that should have been paid. Even when relief before the NLRB is unavailable or inadequate, trust funds will remain liable for pension benefits for hours worked by employees for which no contributions were made.<sup>19</sup> See *Central*

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<sup>17</sup>The court below noted that "[w]here the trust funds absolutely barred, procedurally or otherwise, from any remedy against Advanced except at the instigation of the unions, an alternative result granting jurisdiction to the district court might be justified." 779 F.2d at 503 n.13.

<sup>18</sup>Cf. *Vaca*, 386 U.S. at 182-83 ("The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine").

<sup>19</sup>Trust funds will also remain liable for other fringe benefits when the applicable trust documents provide for benefits for hours worked by employees regardless of an employer's failure to make the required contributions.

*States Southeast and Southwest Areas Pension Fund v. Hitchings Trucking, Inc.*, 472 F. Supp. 1243, 1247 (E.D. Mich. 1979) ("ERISA protects employees' rights to pension funds under pension trusts if the employees qualify. 29 U.S.C. §§ 1052, 1053 and 1054. Whether payments to the trust have or have not been made by the employer is not relevant in the determination as to whether or not an employee qualifies"); *Central Transport*, 86 L.Ed.2d at 455 n.7, 463 n.20 ("the Labor Department has consistently taken the position that any pension plan document language denying benefits to a participant because of an employer's failure to make required contributions would violate ERISA and would thus be unenforceable . . . At a minimum, this means that [a trust fund] is reasonable in operating . . . under the assumption that it would be liable for pension claims regardless of an employer's failure to make required contributions"); *Central States, Southeast and Southwest Areas Pension Fund v. McNamara Motor Express, Inc.*, 503 F. Supp. 96 (W.D. Mich. 1980); 29 C.F.R. § 2530.200b-2.

Despite the express Congressional desire in enacting Section 515 to facilitate the collection of delinquent contributions as a way of securing the financial health of multiemployer employee benefit plans, multiemployer plans will, as a result of the decision below, be required to meet the financial burden of ERISA's guarantees in the form of pension payments without corresponding contributions to the plans. The Trust Funds respectfully submit that they must be afforded the opportunity to enforce post-contract expiration contribution obligations in the federal district courts of this nation. To hold otherwise will compromise the actuarial soundness of multiemployer plans and obstruct the trustees in their performance of the fiduciary obligations imposed on them by ERISA, as amended, and Section 302 of the LMRA.

### **III. The Decision Below That Actions Under Section 515 of ERISA to Collect Post-Contract Expiration Contribution Delinquencies Are Preempted by the NLRA Under *Garmon* Conflicts with Decisions of This Court.**

The Ninth Circuit's literal and mechanical application of the *Garmon* preemption doctrine in the instant case conflicts with decisions

of this Court.<sup>20</sup> While the Court has not directly addressed the question presented for review in this petition, the Court has expressly refused to apply the *Garmon* preemption doctrine in cases involving federal statutes other than ERISA where the alleged conduct was an unfair labor practice within the jurisdiction of the NLRB. See, e.g., *Smith v. Evening News Association*, 371 U.S. 195 (1962) (Section 301 of the LMRA); *Vaca*, *supra* (Section 301 of the LMRA); *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) (the federal antitrust laws). This Court recognized in *Connell* that:

In most cases a decision that state law is pre-empted leaves the parties with recourse only to the federal labor law, as enforced by the NLRB. [citation of *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), and *Garmon*] But in cases like this one, where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies. [citation of *Vaca* and *Smith v. Evening News*]

421 U.S. at 635 n.17. See *California State Council of Carpenters v. Associated General Contractors*, 648 F.2d 527, 532 n.6 (9th Cir. 1980), *rev'd in part on other grounds*, 459 U.S. 519 (1983); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 518-19 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). In *Connell*, the Court, in refusing to apply the *Garmon* preemption doctrine,

<sup>20</sup>The Court has often stated that the "*Garmon* guidelines [are not to be applied] in a literal, mechanical fashion." *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 188 (1978); *Operating Engineers v. Jones*, 460 U.S. 669, 676 (1983). Since the Court initially set forth the *Garmon* doctrine in 1959, it has recognized numerous exceptions to NLRB preemption. For example, "[t]his pre-emption doctrine . . . has never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca*, 386 U.S. at 179. See *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 302 (1977). The Court has also "refused to apply the pre-emption doctrine 'where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes.' [Citations omitted.]" *Farmer*, 430 U.S. at 297. In addition, the Court has pointed out that "the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." *Vaca*, 386 U.S. at 180. Accord *Farmer*, 430 U.S. at 300-01.

permitted an antitrust action under the Sherman Act to proceed with respect to an agreement that the Court found illegal under Section 8(e) of the NLRA, as amended, 29 U.S.C. §158(e), and reiterated its holding in other cases that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies, including the antitrust laws." 421 U.S. at 626 (footnote omitted). See *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 85 (1982); *Pratt-Farnsworth*, 690 F.2d at 519 ("To the extent that collateral labor law issues arise in the course of an ERISA claim, the federal courts should be empowered to decide them").

The court below emphasized that, with respect to the failure to pay contributions after contract expiration, "[w]ithout a section 8(a)(5) violation, there is no section 515 infraction." 779 F.2d at 504. On that basis, the Ninth Circuit mechanically applied the *Garmon* preemption doctrine and incorrectly concluded that "[m]aking this underlying labor law determination is exclusively an NLRB matter." *Id.* Applicable decisions of this Court indicate that rigid application of the *Garmon* preemption doctrine is to be avoided, especially "where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca*, 386 U.S. at 179. See *Farmer*, 430 U.S. at 302.<sup>21</sup>

It cannot fairly be inferred in the instant case that Congress intended exclusive jurisdiction to lie with the NLRB. *First*, the MPPAA was passed in 1980, well after the Court's decision in *Connell* in 1975 which recognized (based on its prior decisions in *Vaca* in 1967 and *Smith v. Evening News* in 1962) that, "where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies." *Connell*, 421 U.S. at 635 n.17. *Second*, nowhere does ERISA, as amended, require that any action under its provisions be taken before the NLRB.

<sup>21</sup>The court below improperly suggested a different standard:

We find no persuasive evidence in either the plain words or legislative history of ERISA or the MPPAA that Congress intended section 515 to be an exception to the general rule of NLRB preemption for that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse.

*Third*, the *Garmon* preemption doctrine has not been applied to another federal statute, Section 303 of the LMRA, 29 U.S.C. §187, which incorporates some of the obligations embodied in the NLRA, as amended.<sup>22</sup> Allowing trust funds to seek judicial relief under Section 515 of ERISA in order to compel an employer's compliance with the contribution obligations imposed upon it by Section 8(a)(5) of the NLRA is analogous to litigation under Section 303 of the LMRA. Section 303 of the LMRA authorizes state and federal courts to award damages to any person injured by reason of any violation of Section 8(b)(4) of the NLRA, as amended, even though the underlying unfair labor practices are remediable by the NLRB. See *Teamsters v. Morton*, 377 U.S. 252, 258 (1964).<sup>23</sup> Thus, that Section 515 of ERISA incorporates some of the obligations embodied in the NLRA is not unique; Congress has previously enacted other legislation which does exactly that, namely, Section 303 of the LMRA. Without a Section 8(b)(4) violation, there is no Section 303 infraction. Nevertheless, making that underlying labor law determination is not exclusively an NLRB matter.

<sup>22</sup>In addition to the judicially developed exceptions, Congress itself has created exceptions to the NLRB's exclusive jurisdiction in other classes of cases:

Section 303 of the Labor Management Relations Act of 1947, 61 Stat. 158, as amended, 29 U.S.C. §187, authorizes anyone injured in his business or property by activity violative of §8(b)(4) of the NLRA, 61 Stat. 140, as amended, 29 U.S.C. §158(b)(4), to recover damages in federal district court even though the underlying unfair labor practices are remediable by the Board. See *Teamsters v. Morton*, 377 U.S. 252 (1964). Section 301 of the LMRA, 29 U.S.C. §185, authorizes suits for breach of a collective-bargaining agreement even if the breach is an unfair labor practice within the Board's jurisdiction. See *Smith v. Evening News Assn.*, 371 U.S. 195 (1962). Section 14(c)(2) of the NLRA, as added by Title VII, §701(a) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 541, 29 U.S.C. §164(c)(2), permits state agencies and state courts to assert jurisdiction over "labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction."

*Farmer*, 430 U.S. at 297 n.8. *Accord Vaca*, 386 U.S. at 179-80.

<sup>23</sup>Section 8(b)(4) of the NLRA, as amended, 29 U.S.C. §158(b)(4), provides that certain conduct constitutes an unfair labor practice for which an administrative remedy before the NLRB is afforded.

*Fourth*, "this underlying labor law determination" (779 F.2d at 504), which the court below claims "is exclusively an NLRB matter" (*id.*) in the context of suits to collect delinquent contributions under Section 515 of ERISA, has been, and will continue to be, decided regularly by the federal courts under ERISA, as amended, in, for example, the context of suits to collect delinquent withdrawal liability payments. As discussed *supra*, when determining whether or not an employer has withdrawn and has withdrawal liability, the federal courts will have to determine whether or not the employer's obligation to contribute permanently ceased under "applicable labor-management relations law." 29 U.S.C. §1392(a)(2). As a result, in withdrawal liability litigation under ERISA, as amended, the federal courts must decide precisely the same issues regarding "impasse," refusal to bargain, and the date of cessation of the contribution obligation, which the federal courts would be called upon to decide in post-contract expiration contribution collection actions under Section 515. *See, e.g., Schulze, supra; Woodward, supra.* Consequently, the Ninth Circuit's assertion that these underlying labor law determinations are exclusively an NLRB matter simply makes no sense in the context of the MPPAA amendments to ERISA. The Trust Funds respectfully submit that the "intricate relationship" between withdrawal liability and post-contract expiration contribution obligations is an "intensely practical consideration[] which foreclose[s] pre-emption of judicial cognizance of" (*Vaca*, 386 U.S. at 183) post-contract expiration contribution collection actions under Section 515.<sup>24</sup>

Allowing trust funds to seek judicial relief under Section 515 to require an employer's compliance with the contribution obligations imposed upon it by the NLRA will not disserve the interests promoted by the federal labor statutes or interfere with the policy to be served by NLRB enforcement. Both avenues will lead to the desired result of compelling the employer to continue making contributions

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<sup>24</sup> Cf. *Vaca*, 386 U.S. at 183 ("There are some intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under LMRA § 301 charging an employer with a breach of contract").

beyond the expiration date of the agreement until a new agreement is reached or the duty to bargain ceases. Since the federal courts must decide issues such as impasse and the date of cessation of the contribution obligation in the context of withdrawal liability litigation, it should be no great imposition on federal labor policy for the courts to decide these same issues in a contribution delinquency context. That Congress so intended is evinced by the MPPAA amendments to ERISA which expressly provide that suits to collect withdrawal liability are to be treated in the same manner as suits to collect delinquent contributions under Section 515. 29 U.S.C. §§1401(d), 1451(b). As a result, recognition of an independent federal remedy under Section 515 for post-contract expiration contribution delinquencies is proper since said remedy is consistent with the NLRA, and this Court has permitted a choice of federal remedies in such cases.

ERISA, as amended, sets forth a clear Congressional policy of comprehensively dealing with all facets of fringe benefit contributions due from employers. It cannot be disputed that Section 515 of ERISA encompasses suits to collect delinquent contributions coming due before a collective bargaining agreement has expired. Similarly, withdrawal liability under ERISA, as amended, would normally arise only following impasse in negotiations, when the obligation to contribute imposed by Section 8(a)(5) of the NLRA finally ends. In both circumstances, ERISA, as amended, provides federal judicial remedies. 29 U.S.C. §§1132, 1401(b) and 1451(c). It simply makes no sense to conclude that Congress intended to create in the MPPAA amendments to ERISA a hiatus in federal judicial remedies between the date the contract expires and the date an impasse is reached in negotiations, or to carve out, *sub silentio*, an exception to federal judicial oversight in favor of the NLRB in a statutory framework envisioning a complete and coherent federal judicial approach to trust fund administration and enforcement.

### CONCLUSION

For the reasons suggested above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 1986

APPENDIX A

United States Court of Appeals  
For The Ninth Circuit  
Nos. 84-2403 to 84-2406

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bomers Health and Welfare Trust )  
nd for Northern California, )  
al., )  
Plaintiffs-Appellants, )  
v. )  
vanced Lightweight Concrete )  
. Inc., )  
Defendant-Appellee. )  

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Plaintiffs-Appellants, )  
v. )  
vanced Lightweight Concrete )  
. Inc., )  
Defendant-Appellee. )  

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[Decided December 26, 1985]

OPINION

An Appeal  
From the United States District Court  
For the Northern District of California

Honorable Spencer J. Williams,  
Judge Presiding  
Argued and submitted October 8, 1985  
Before: CHAMBERS, TANG, and PREGERSON  
Circuit Judges.

PREGERSON, Circuit Judge:

In this case of first impression for an appellate court, we hold that the primary jurisdiction of the National Labor Relations Board preempts a trust fund's suit in district court under sections 502 and 515 of the Employee Retirement Income Security Act ("ERISA") to recover delinquent contributions accrued after a collective bargaining agreement has expired.

FACTS

As a member of the Associated General Contractors of California ("AGC"), Advanced Lightweight Concrete Co.

("Advanced") was a signatory both to the 1980-83 Laborers Master Labor Agreement and to the 1980-83 Cement Masons Master Labor Agreement ("master agreements"). These multi-employer collective bargaining agreements included a requirement that Advanced contribute on behalf of its employees to: the Laborers Health and Welfare Trust Fund for Northern California; the Laborers Pension Trust Fund for Northern California; the Laborers Vacations-Holiday-Dues Trust Fund for Northern California; and the Laborers Training and Retraining Trust Funds for Northern California; and to the Cement Masons' Health and Welfare Trust Fund for Northern California; the Cement Masons Pension Trust Fund for Northern California; the Cement Masons Vacation-Holiday-Supplemental Dues Trust Fund for Northern California; and the

Cement Masons Apprenticeship and Training Trust Fund for Northern California Fund ("trust funds"). The master agreements both incorporated the terms of the trusts by reference and specified the contributions due per employee hour worked from a signatory employer to the funds during the term of the agreement.

Before the expiration of the master agreements, Advanced withdrew AGC's authority to bargain on its behalf, and notified the Northern California District Council of Laborers of the Laborers International Union of North America AFL-CIO, the District Council of Plasterers and Cement Masons of Northern California, and the relevant local unions ("the unions") that it would not be bound by either the master agreements or any successor agreements beyond their June 15, 1983 expiration date. Advanced also

declared to the unions its readiness to negotiate independently.

While the parties disagree as to the nature of further contacts between Advanced and the unions<sup>1/</sup>, it is not

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Advanced's brief states:  
"Neither the Laborers' nor the Cement Masons' unions made any attempt to commence collective bargaining negotiations with the Company."

The Trust Funds' brief states:  
"Collective bargaining negotiations occurred between the Laborers Union and Advanced Lightweight after April 1, 1983."

On November 3, 1983, the Northern California District Council of Laborers filed an unfair labor practice charge against Advanced with the National Labor Relations Board ("NLRB") alleging a failure to bargain in good faith. No. 32-CA-6027. On November 28, 1983, the Regional Director refused to issue a complaint, noting the union's failure to provide any timely supporting documentary evidence. On December 30, 1983, the NLRB Office of Appeals denied the

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disputed that Advanced has not signed any collective agreement with either the Laborers' or Cement Masons' unions. There is also no dispute that Advanced has paid no contributions to either trust fund since June 15, 1983.

In December 1983, the trust funds filed separate suits against Advanced seeking unpaid contributions from June 15, 1983. In March and April 1984, the trust funds filed two further complaints demanding an audit of Advanced's books in accordance with the terms of the master

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union's appeal. The record shows that at least one meeting occurred between Advanced and Laborers' representatives on December 29, 1983.

agreements.<sup>1/</sup> The former cases alleged jurisdiction based on ERISA § 502, 29 U.S.C. § 1132, and § 515, 29 U.S.C. § 1145, and Labor Management Relations Act ("LMRA") § 301, 29 U.S.C. § 185. In May 1984, the four cases were consolidated as related cases under local rules.

Relying entirely on Cement Masons Health and Welfare Trust Fund for Northern California v. Kirkwood-Bly, Inc., 520 F. Supp. 942 (N.D. Cal. 1981),

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<sup>1/</sup> Both master agreements, in essentially similar terms, require a signatory employer to submit to an audit by the trust funds in order to enforce the contributions requirements in the agreements. Both funds wrote to Advanced seeking audits immediately following the filing of the first pair of suits. Advanced consented to audits only up to June 15, 1983 claiming that it was not bound by the audit provision beyond the expiration of the master agreements. No audits have ever been made.

aff'd for the reasons stated in the district court's opinion, 692 F.2d 641 (9th Cir. 1982), the district court held that it had no jurisdiction over the four related suits and granted summary judgment to Advanced. Trust funds timely appealed.

#### STANDARD OF REVIEW

A district court's determination that it is without subject matter jurisdiction is reviewed de novo. Fort Vancouver Plywood Co. v. United States, 747 F.2d 547, 549 (9th Cir. 1984). In reviewing a district court's grant of summary judgment, all inferences from the evidence are viewed in the light most favorable to the party against whom summary judgment was granted. Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1328-29 (9th Cir. 1983).

## DISCUSSION

## A.

Freezing the status quo ante after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract. Thus, an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1), 158(a)(5) and 158(d). NLRB v. Katz, 369 U.S. 736, 743, 82 S.Ct. 1107, 1111, 8 L.Ed.2d 230 (1962). Consequently, any unilateral change by the employer in the pension fund arrangements provided by an expired agreement is an unfair labor

practice. Peerless Roofing Co. v. NLRB,  
641 F.2d 734, 736 (9th Cir. 1981);  
Producer's Dairy Delivery Co. v. Western  
Conference of Teamsters Pension Trust  
Fund, 654 F.2d 625, 627 (9th Cir. 1981).  
However, after bargaining to impasse,<sup>1/</sup>

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<sup>1/</sup> "Impasse" is an imprecise term of art:

The definition of an "impasse" is understandable enough--that point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless--but its application can be difficult. Given the many factors commonly itemized by the Board and courts in impasse cases, perhaps all that can be said with confidence is that an impasse is a "state of facts in which the parties, despite the best of faith, are simply deadlocked." The Board and courts look to such matters as the number of meetings between the company and the union, the length of those meetings and the period of time

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the employer may unilaterally implement  
the best offer made in negotiations.

Katz, 369 U.S. at 745, 82 S.Ct. at 1112.

B.

In granting summary judgment, the  
district court relied on Cement Masons  
Health and Welfare Trust Fund for  
Northern California v. Kirkwood-Bly,  
Inc., 520 F. Supp. 942 (N.D. Cal. 1981),  
aff'd for the reasons stated in the

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that has transpired between the  
start of negotiations and their  
breaking off. There is no  
magic number of meetings, hours  
or weeks which will reliably  
determine when an impasse has  
occurred.

R. Gorman, Basic Text on Labor  
Law, Unionization and Collective  
Bargaining 448 (1976)(citation  
omitted). See also H & D Inc. v.  
NLRB, 665 F.2d 257, 259-60 (9th  
Cir. 1980), rev'd on other  
grounds, 455 U.S. 902, 102 S.Ct.  
1243, 71 L.Ed.2d 440 (1982).

district court's opinion, 692 F.2d 641 (9th Cir. 1982). In Kirkwood-Bly, a trust fund sued under section 301 of the LMRA to recover contributions due after a collective agreement had expired but before impasse. 520 F. Supp. at 943. The district court reasoned that a collective bargaining agreement does not "survive" in the sense that it continues as a legally operative document; rather, the agreement's terms "survive" in order to define the parameters of the employer's obligation under section 8(a)(5) to maintain the status quo during negotiations. 520 F. Supp. at 943-45. Thus, the NLRB's primary jurisdiction preempts a suit to enforce the terms of

an expired collective agreement.<sup>4/</sup>

The trust funds dispute the validity of Kirkwood-Bly to their suits.

Kirkwood-Bly expressly does not decide

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<sup>4/</sup> "As a general rule, federal courts do not have jurisdiction over activity which 'is arguably subject to § 7 or § 8 of the [NLRA],' and they 'must defer to the exclusive competence of the National Labor Relations Board.'" Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 83, 102 S.Ct. 851, 859, 70 L.Ed.2d 833 (1982)(quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 780, 3 L.Ed.2d 775 (1959)(citing Garner v. Teamsters, 346 U.S. 485, 490-91, 74 S.Ct. 161, 165-66, 98 L.Ed. 228 (1953))).

A panel of this court summarily affirmed in Kirkwood-Bly, 692 F.2d 741 (9th Cir. 1982), and later reaffirmed the Kirkwood-Bly reasoning in the context of subsequent Supreme Court decisions. George Day Construction Co. v. United Brotherhood of Carpenters and Joiners, 722 F.2d 1471, 1481 (9th Cir. 1984).

any similar trust fund suit brought under section 515 of ERISA. 520 F. Supp. at 946 n.2<sup>1/</sup>. Moreover, in an opinion decided after the district court's grant of summary judgment to Advanced, Chief Judge Peckham, who wrote the district court opinion in Kirkwood-Bly, held that the NLRA does not preempt a section 515 suit to recover delinquent contributions due after the expiration of a collective bargaining agreement. Laborers Health and Welfare Trust Fund v. Hess, 594 F.

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<sup>1/</sup>

"Plaintiffs do not argue that defendants have violated section 515 of ERISA, 29 U.S.C. § 1145...In fact, plaintiffs do not allege any ERISA violation or that ERISA can provide an alternate basis for jurisdiction." 510 F. Supp. at 946 n.2.

Supp. 273, 282 (N.D. Cal. 1984).<sup>1/</sup>

Kirkwood-Bly thus is not necessarily

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<sup>1/</sup> Hess was subsequently dismissed by stipulation of the parties.

In the district court, the trust funds relied on I.A.M. National Pension Fund v. Schulze Tool and Die Co., 564 F. Supp. at 1285 (N.D. Cal. 1983). In Schulze, the employer made fund contributions after the expiration of the collective agreement, and then ceased payments. 564 F. Supp. at 1288. The court rejected the trust fund's § 515 claim for delinquent contributions finding that impasse had been reached, thus relieving Schulze of any outstanding obligation to the fund. Id. at 1297-98. In Hess, Judge Peckham refused to regard Schulze as determinative authority: "By assessing the merits of the claim for unpaid contributions, the court implicitly held that it had jurisdiction over the claim. But the court did not explicitly discuss the question of jurisdiction in its opinion." 594 F. Supp. at 279. The district court's decision to resolve the impasse issue in Schulze is

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determinative of the trust funds' suits insofar as they are based on section 515 of ERISA. However, Kirkwood-Bly does, as both parties concede, mandate affirmance of summary judgment on the trust funds' section 301-based causes of action.

C.

Section 515 of ERISA, 29 U.S.C. section 1145, states:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

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clearly at odds with our conclusion here that the primary jurisdiction of the NLRB preempts a § 515 suit to recover unpaid contributions after a collective agreement has expired.

Section 515 was added to ERISA in 1980 by  
section 306(a) of the Multiemployer  
Pension Plan Amendment Act ("MPPAA")<sup>1/</sup>  
to allow trust funds to recover

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<sup>1/</sup> Pub. L. 96-364, 94 Stat. 1295, 29  
U.S.C. § 1132 et seq.

Section 515, in common with  
other ERISA provisions, is  
enforced via § 502(a)(3) of ERISA,  
29 U.S.C. § 1132 (a)(3):

A civil action may be brought--

....

(3) by a participant, beneficiary  
or fiduciary (A) to enjoin any act  
or practice which violates any  
provision of this subchapter or  
the terms of the plan, or (B) to  
obtain other appropriate equitable  
relief (i) to redress such  
violations or (ii) to enforce any  
provisions of this subchapter or  
the terms of the plan.

delinquent contributions from employers  
as expeditiously as possible.<sup>1/</sup>

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- <sup>1/</sup> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly, and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously, and without regard to issues which might arise under labor-management relations law--other than 29 U.S.C. § 186. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises...[T]his legislation is intended to clarify the law...by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer.

126 Cong. Rec. 23039 (1980) (statement

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In Hess, the court's conclusion that the NLRA does not preempt a section 515 suit after the collective agreement has expired relied heavily on statutory analysis. Based on this analysis, the court characterized the purpose of section 515 as remedial. Three other reported decisions have dealt explicitly with this issue subsequent to Hess, and all reach the opposite conclusion.

Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co., 605 F. Supp. 1441, 1444-48 (W.D. Mo. 1985); U.A. 198 Health and Welfare Education and Pensions Funds v.

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of Rep. Thompson); id. at 23288 (statement of Sen. Williams). See also Kaiser Steel Corp. v. Mullins, 455 U.S. 72, 86-88, 102 S.Ct. 851, 861-62, 70 L.Ed.2d 833 (1982); id. at 91-97, 102 S.Ct. at 864-66 (Brennan J. dissenting).

Rester Refrigeration Service, Inc., 612 F. Supp. 1033, 1036-38 (M.D. La. 1985);  
Pattern Makers' Pension Trust Fund v. Badger Pattern Works, Inc., 615 F. Supp. 792, 798-800 (N.D. Ill. 1985).<sup>2/</sup>

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<sup>2/</sup> The trust fund in Botsford has not appealed the dismissal of its suit. Both Rester and Badger adopt the Botsford reasoning over Hess without themselves reviewing the issues in detail. In Badger, the court found an alternative ground for jurisdiction under ERISA § 502. Badger 615 F. Supp. at 800-02. The employer had signed, as a term of the expired collective agreement, a supplemental agreement with the trust fund committing itself to contribute to the funds "until written notice revoking this Agreement is given to the Trust." Id. at 796-97. Badger's failure to revoke this supplemental agreement until many months after the collective agreement had expired made it liable to the trust fund for delinquent contributions between expiration and revocation. Id. at 801-02. There is no evidence in the record

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Hess rests on three premises. First, a phrase similar to "obligated to make contributions," which appears in section 515, is defined elsewhere in ERISA as "an obligation to contribute arising...(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law." 29 U.S.C. § 1392(a). Subpart (2) of this definition would seem to include obligations created by section 8(a)(5). Since no other relevant definition appears in ERISA, Hess concludes that

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of any supplemental agreement between Advanced and the trust funds. The actual trust agreements are not part of this record, but they must also be assumed not to provide the trust funds with any basis of recovery other than § 515.

the phrase used in section 515 has a similarly broad scope. 594 F. Supp. at 279. Yet, as Botsford points out, the section 1392(a) definition expressly refers only to withdrawal liability.<sup>10/</sup> 605 F. Supp. at 1445. Hence, a more plausible conclusion is that Congress intended withdrawal liability to be more broadly based than

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<sup>10/</sup> Section 1392(a) begins: "For purposes of this part, the term 'obligation to contribute' means...." This clearly refers to Part I ("Employer Withdrawals") of Subtitle E ("Special Provisions for Multiemployer Plans") within Subchapter III ("Plan Termination Insurance") of ERISA. Section 515 is in Part 5 ("Administration and Enforcement") of Subtitle B ("Regulatory Provisions") within Subchapter I ("Protection of Employee Benefit Rights.") As the court noted in Hess: "Withdrawal liability is something quite different from regular fringe benefit contributions." 594 F. Supp. at 279 n.6.

employer's general liability for ERISA violations.

Second, Hess observes that section 515 applies to employers who are "obligated to make contributions...under the terms of a collectively bargained agreement", 594 F. Supp. at 279 (emphasis in original), and concludes that this specificity of phrase--and the absence of any other less precise phrase--suggests that section 8(a)(5) obligations were intended to fall within section 515.

Id. We believe this conclusion to be incorrect. More persuasive is the similarity between the phraseology in section 515 and that in section 1392(a)(1) ("obligation to contribute arising...under one or more collective bargaining...agreements"), which would reinforce the conclusion that Congress intended section 515 liability to be less

extensive than withdrawal liability. As Botsford properly observes, there is no reason to believe that Congress would use "an ambiguous, metaphysical concept to define an obligation [in section 515] when it has used a crystal clear definition elsewhere [in section 1392] in the same act." 605 F. Supp. at 1445.

Third, Hess notes that the Congressional sponsors' statements indicate that the purpose of section 515 was to limit drastically the defenses available to employers in delinquent contribution suits. 594 F. Supp. at 280-81.<sup>111</sup> Since the disapproved

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<sup>111</sup> See 126 Cong. Rec. 23039 (statement of Rep. Thompson); id. at 23288 (statement of Sen. Williams) & n.10 supra. The Supreme Court has reached a similar conclusion: Kaiser Steel

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defenses could be asserted equally after an agreement has expired as before, Hess concludes that "it would make little sense to limit section 515 to actions involving obligations based on extant collective bargaining agreements." 594 F. Supp. at 281. Again the reasoning is unconvincing. No indication exists that, during its deliberations on the MPPAA, Congress even considered the problem of continuing obligations from expired agreements much less than it had a view on resolving any conflict between section

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Corp v. Mullins, 455 U.S. 72, 88, 102 S.Ct. 851, 862, 70 L.Ed.2d 833 (1982). See also Southern California Retail Clerks Union and Food Employers Joint Pension Trust Fund v. Bjorklund, 728 F.2d 1262, 1265-66 (9th Cir. 1984).

515 and the primary jurisdiction of the  
NLRB.<sup>11/</sup>

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<sup>12/</sup> Advanced refers to a staff report to the responsible Senate Committee which states that § 515's purpose was to avoid "complex litigation concerning claims and defenses unrelated to the employer's promise and the Plan's entitlement to the contributions." Senate Committee on Labor and Human Resources, 96 Cong., 2d Sess. 44 (Comm. Print 1980). Advanced asserts that this demonstrates Congressional intent to limit § 515 to pure contractual obligations, not obligations continued by the mandates of other statutes. A contrary interpretation of Congressional intent might be gleaned from a statement of both sponsors of the bill: "The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans." 126 Cong. Rec. 23039 (statement of Rep. Thompson); id. at 23288 (statement of Sen. Williams). This statement may suggest that the source of the employer's obligation is irrelevant to his duty to contribute.

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D.

Denying district court jurisdiction to the trust funds need not prejudice their claims against Advanced. There is no bar to the trust funds' filing an unfair labor practice charge against Advanced. 29 U.S.C. § 160(b); 29 C.F.R. § 102.9 ("A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person."); see Local Union

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Both analyses are plausible, especially when the highlighted phrases are examined out of context. In truth, no conclusion concerning Congressional intent over the availability of § 515 in a situation such as this could be proper given the absence of any indication that Congress was aware of the potential for conflict between § 515 and §§ 7 and 8 of the NLRA.

No. 25 International Brotherhood of Teamsters v. New York, New Haven and Hartford Co., 350 U.S. 155, 160 76 S.Ct. 227, 230, 100 L.Ed. 166 (1956) (railroad may file unfair labor practice charge); Plumbers and Steamfitters Local 298 v. County of Door, 359 U.S. 354, 357-58, 79 S.Ct. 844, 846 3 L.Ed.2d 872 (1959) (county may file charge); Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 515-17 n.11 (5th Cir. 1982) cert. denied, 464 U.S. 932, 104 S.Ct. 335, 78 L.Ed.2d 305 (1983) ("[A]ny person, even a stranger to the collective bargaining agreement can bring unfair labor practice charges").<sup>13/</sup> The

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<sup>13/</sup> The assertion in Botsford that a trust fund has no standing to file § 8(a)(5) charges is therefore wrong. 605 F. Supp. at

dismissal of the union's charge against Advanced, see note 1 supra, does not

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1447. Were the trust funds absolutely barred, procedurally or otherwise, from any remedy against Advanced except at the instigation of the unions, an alternative result granting jurisdiction to the district court might be justified. This circuit has permitted a trust fund to proceed to trial on the merits in an ERISA enforcement action duplicating NLRA matters "where the injured party bringing the suit has no acceptable means to invoke the Board's jurisdiction and cannot induce its adversary to do so." Laborers Health and Welfare Trust Fund v. Kaufman & Broad, 707 F.2d 412, 415-16 (9th Cir. 1983). See also Operating Engineers Pension Trust v. Beck Engineering and Surveying Co., 746 F.2d 557, 565 (9th Cir. 1984) (extending Kaufman to defenses which cannot be presented to the Board); Sears, Roebuck & Co v. San Diego County District Council of Carpenters, 436 U.S. 180, 201-02, 98 S.Ct. 1745, 1759-60, 56 L.Ed.2d 209 (1978) (state court not necessarily

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prevent the trust funds filing a separate charge: the union's charge does not refer

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preempted if no other forum available).

The availability of an NLRB remedy to the trust funds obviates any potential fiduciary liability of the trustees to the fund beneficiaries caused by the dismissal of the § 515 suit. See Rosen v. Hotel and Restaurant Employees and Bartenders Union, 637 F.2d 592, 600 (3d Cir. 1981), cert. denied, 454 U.S. 898, 102 S.Ct. 398, 70 L.Ed.2d 213 (1982); Kaufman, 707 F.2d at 416. Similarly, the trust funds' ability to prosecute their claim in an alternative form makes it unnecessary to consider the applicability here of the distinctions between the rights of trustees of a fund benefiting from a collective agreement and the rights of a union under the same agreement noted in Robbins v. Prosser's Moving and Storage Co., 700 F.2d 433, 439-41 (8th Cir. 1983)(en banc), aff'd sub nom. Schneider Moving and Storage Co. v. Robbins, 466 U.S. 364, 104 S.Ct. 1844, 80 L.Ed.2d 366 (1984).

to a failure to pay trust fund contributions and in denying the complaint, the NLRB stated: "This office will fully investigate any future charge in this matter...subject to the six month limitation period under Section 10(b) of the Act."<sup>14</sup>

E.

The lack of useful statutory or Congressional guidance on section 515 requires that the matter be decided by the application of accepted labor law principles. When presented with a

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<sup>14</sup> At oral argument, counsel for the trust funds claimed that any NLRB charge by the funds against Advanced would be time-barred. If the funds' assertion that no impasse has yet been reached between Advanced and the unions is correct, Advanced's violation of § 8(a)(5) would be continuing, and thus a charge by the funds would be timely.

dispute that involves adjudicating conduct which "is arguably within the compass of § 7 or § 8 of the NLRA," a federal court must defer to the primary jurisdiction of the NLRB. San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959). "The desire to protect the primary jurisdiction of the NLRB flows from the need to maintain centralized administration of the NLRA by a specialized agency. Labor law involves many difficult questions of policy best left to the agency that has the expertise needed to solve them. Thus, the courts have traditionally shown great deference to the NLRB." Burke v. French Equipment Rental, Inc., 687 F.2d 307, 311 (9th Cir. 1982). See also Glaziers & Glassworkers Local Union No. 767 v. Custom Auto Glass Distributors, 689 F.2d 1339, 1342 (9th

Cir. 1982) (Congress intended matters of national labor policy to be decided first by NLRB).

In Kirkwood-Bly, the Ninth Circuit concluded that an employer's duty to pay trust fund contributions after a collective agreement has expired derives entirely from section 8(a)(5) and that a section 301 suit to recover unpaid contributions between expiration and impasse was preempted. 692 F.2d 641 (9th Cir. 1982), affirming, 520 F. Supp. at 944-45. The Kirkwood-Bly logic is equally persuasive in an ERISA-based suit. As with the employer in Kirkwood-Bly, Advanced's failure to pay contributions after the master agreements' expiration is, at least, an arguable unfair labor practice. While admittedly the failure to pay may also violate section 515 of ERISA,

adjudication of the merits depends entirely on the section 8(a)(5) determination. Without a section 8(a)(5) violation, there is no section 515 infraction. Making this underlying labor law determination is exclusively an NLRB matter.<sup>15/</sup>

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<sup>15/</sup>

See Milk Drivers and Dairy Employees Union, Teamsters Local 302 v. Vevoda, 772 F.2d 530, 533 (9th Cir. 1985)(defendants' defense that union shop clause did not require union membership preempted by NLRB's primary jurisdiction); Arizona Laborers, Teamsters and Cement Masons Local 495 Health and Welfare Trust Fund v. Conquer Cartage Co., 753 F.2d 1512, 1515-17 & n.7 (9th Cir. 1985)(trust fund's defense, that the employer's failure to give the requisite 60 days notice of termination under NLRA § 8(d)(1) prevented the employer from claiming the expiration of the collective bargaining agreement, was preempted: "Because this argument is based entirely on the allegation that the employer

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We find no persuasive evidence in either the plain words or legislative

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committed an unfair labor practice under the NLRA, we lack jurisdiction to address its merits." Id. at 1516).

Advanced asserts that impasse was reached, or, if not, that the unions waived their bargaining rights, thus permitting Advanced to make unilateral changes in working conditions, but admits that the NLRB has never accepted this argument. Advanced suggests that since the duty to bargain in good faith created by § 8(d) of the NLRA is mutual, a union that breaches this duty should not be permitted to complain about the employer's unilateral changes in working conditions. Determining the merits of this argument is initially a matter of the NLRB. We, however, note that Advanced concededly made no payments after the day of expiration of the collective agreement. Since Advanced apparently breached §§ 8(d) and 8(a)(5) before the unions can possibly have waived their rights, it seems unlikely that Advanced could

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history of ERISA or the MPPAA that Congress intended section 515 to be an exception to the general rule of NLRB preemption for that narrow category of suits seeking recovery of unpaid contributions accrued during the period between contract expiration and impasse. Therefore, the district court's grant of summary judgment to Advanced must be affirmed.

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successfully defend a properly documented fair labor practice charge. See Katz, 369 U.S. at 741-42, 82 S.Ct. at 1110-11.

#### APPENDIX B

FILED  
July 30, 1984

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT  
OF CALIFORNIA

LABORERS HEALTH AND WELFARE TRUST FUND FOR NORTHERN CALIFORNIA, et al.,	)	No. C 83-6038-SW
Plaintiffs,	)	and related cases
v.	)	C 83-6039-SW
ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,	)	C 84-1467-SW
Defendant.	)	C 84-1802-SW

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ORDER GRANTING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment in the above-captioned related cases is hereby GRANTED.

July 30, 1984

/s/ Spencer Williams  
UNITED STATES DISTRICT COURT

[Entered on July 31, 1984]

APPENDIX C

FILED  
March 18, 1986

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LABORERS HEALTH AND WELFARE	)	Nos.
TRUST FUND FOR NORTHERN	)	
CALIFORNIA, et al.,	)	84-2403,
Plaintiffs-Appellants,	)	84-2404,
v.	)	84-2405,
	)	84-2406
ADVANCED LIGHTWEIGHT CONCRETE	)	ORDER
CO., INC.,	)	
Defendant-Appellee.	)	
	)	

Before: CHAMBERS, TANG, and PREGERSON,  
Circuit Judges.

The panel as constituted above voted  
to deny the petition for rehearing.

Judges Tang and Pregerson voted to reject  
the suggestion for rehearing en banc and  
Judge Chambers recommends such rejection.

The full court has been advised of  
the suggestion for rehearing en banc, and  
no judge of the court has requested a

vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

The motion for leave to file an amicus brief is denied as moot.

#### APPENDIX D

##### STATUTES INVOLVED

###### A. National Labor Relations Act, As Amended

Section 7 of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29

U.S.C. § 157, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 8 of the NLRA, 29 U.S.C. § 158, provides in relevant part:

(a) It shall be an unfair labor practice for an employer--

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents--

....

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is--

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to

enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the

representative of such employees under the provisions of section 159 of this title:

Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the

representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular

work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual

employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

....

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification--

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of

a health care institution, the provisions of this subsection shall be modified as follows:

(A) The notice of paragraph (1) of this subsection shall be ninety days; the notice of paragraph (3) of this subsection shall be sixty days; and the contract period of paragraph (4) of this subsection shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in paragraph (3) of this subsection.

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

(e) It shall be an unfair labor practice for any labor organization and any employer to

enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, That for the purposes of this subsection and subsection (b)(4)(B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber

or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: Provided further, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception...

B. Labor Management Relations Act of 1947, As Amended

Section 301(a) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 185(a), provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 302 of the LMRA, 29 U.S.C. § 186, provides in relevant part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value--

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged

in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [footnote omitted]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: Provided, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable...(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in

the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities...

Section 303 of the LMRA, 29 U.S.C. § 187, provides:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

C. Employee Retirement Income Security Act of 1974, As Amended

Section 502(a)(3) of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA") 29 U.S.C. § 1132(a)(3), provides:

A civil action may be brought...

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this

subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

Section 502(b)(2) of ERISA, as added by  
Section 306(b)(1) of the Multiemployer  
Pension Plan Amendments Act of 1980  
(hereinafter "MPPAA"), 29 U.S.C.

§ 1132(b)(2), provides:

The Secretary shall not initiate an action to enforce section 1145 of this title.

Section 502(f) of ERISA, 29 U.S.C.

§ 1132(f), provides:

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

Section 502(g)(2) of ERISA, as added by

Section 306(b)(2) of the MPPAA, 29 U.S.C.

§ 1132(g)(2), provides:

In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

Section 515 of ERISA, as added by Section 306(a) of the MPPAA, 29 U.S.C. § 1145, provides:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Section 4201(a) of ERISA, as added by

Section 104(2) of the MPPAA, 29 U.S.C. § 1381(a), provides:

If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

Section 4203 of ERISA, as added by

Section 104(2) of the MPPAA, 29 U.S.C. § 1383, provides in relevant part:

(a) For purposes of this part, a complete withdrawal from a

multiemployer plan occurs when an employer--

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

(b)(1) Notwithstanding subsection (a) of this section, in the case of an employer that has an obligation to contribute under a plan for work performed in the building and construction industry, a complete withdrawal occurs only as described in paragraph (2), if--

(A) substantially all the employees with respect to whom the employer has an obligation to contribute under the plan perform work in the building and construction industry, and

(B) the plan--

(i) primarily covers employees in the building and construction industry, or

(ii) is amended to provide that this subsection applies to employers described in this paragraph.

(2) A withdrawal occurs under this paragraph if--

(A) an employer ceases to have an obligation to contribute under the plan, and

(B) the employer--

- (i) continues to perform work in the jurisdiction of the collective bargaining agreement of the type for which contributions were previously required, or
- (ii) resumes such work within 5 years after the date on which the obligation to contribute under the plan ceases, and does not renew the obligation at the time of the resumption.

(3) In the case of a plan terminated by mass withdrawal (within the meaning of section 1341a(a)(2) of this title), paragraph (2) shall be applied by substituting "3 years" for "5 years" in subparagraph (B)(ii).

....

(e) For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations.

Section 4212(a) of ERISA, as added by

Section 104(2) of the MPPAA, 29 U.S.C.

§ 1392(a), provides:

For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising--

- (1) under one or more collective bargaining (or related) agreements, or
- (2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

Section 4221 of ERISA, as added by

Section 104(2) of the MPPAA, 29 U.S.C.

§ 1401, provides in relevant part:

(b)(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the

issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

....

(d) Payments shall be made by an employer in accordance with the determinations made under this part until the arbitrator issues a final decision with respect to the determination submitted for arbitration, with any necessary adjustments in subsequent payments for overpayments or underpayments arising out of the decision of the arbitrator with respect to the determination. If the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title).

Section 4301 of ERISA, as added by

Section 104(2) of the MPPAA, 29 U.S.C. § 1451, provides in relevant part:

(b) In any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment

within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 1145 of this title).

(c) The district courts of the United States shall have exclusive jurisdiction of an action under this section without regard to the amount in controversy, except that State courts of competent jurisdiction shall have concurrent jurisdiction over an action brought by a plan fiduciary to collect withdrawal liability.

D. Multiemployer Pension Plan Amendments Act of 1980

Section 3 of the MPPAA, 29 U.S.C. § 1001a, provides:

(a) The Congress finds that--

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) The Congress further finds that--

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will

enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

(c) It is hereby declared to be the policy of the Act--

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

The other pertinent portions of the MPPAA added sections to ERISA and are reproduced supra with the appropriate section of ERISA.

IN THE

Supreme Court of the United States

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OCTOBER TERM, 1985

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LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,  
*Petitioners,*

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent.*

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BRIEF IN OPPOSITION TO  
PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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July 1986

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## **QUESTION PRESENTED**

Whether federal courts have subject-matter jurisdiction over an action to collect trust fund contributions allegedly accrued after the expiration of the collective bargaining agreement which created the obligation to make contributions.

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No. 85-2079

IN THE

**Supreme Court of the United States****OCTOBER TERM, 1985**

**LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,  
Petitioners,**

v.  
**ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
Respondent.**

---

**On Petition for a Writ of Certiorari to  
the United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF FOR ADVANCED  
LIGHTWEIGHT CONCRETE CO., INC.  
IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the Court of Appeals (Pet. App. A) is reported at 779 F.2d 497. The Court of Appeals' Order denying Petitioners' petition for rehearing and rejecting Petitioners' suggestion for rehearing *en banc* (Pet. App. C) was filed on March 18, 1986. The Order of the United States District Court for the Northern District of California granting summary judgment (Pet. App. B) was filed on July 30, 1984, and entered on July 31, 1984. The District Court's Order is not

## JURISDICTION

Respondent accepts Petitioner's statement of the Court's jurisdiction.

## STATUTES INVOLVED

Respondent accepts Petitioner's statement of the statutes involved. However, Respondent also supplements that statement with Section 8(b)(3) of the National Labor Relations Act, which is reproduced at Appendix A, *infra*.

## STATEMENT

Prior to June 15, 1983, Advanced Lightweight Concrete Co., Inc. ("the Company") was party to multiemployer collective bargaining agreements with the Laborers Union and the Cement Masons Union ("the Unions"). Pursuant to these contracts, the Company made monthly contributions on behalf of its employees to the Laborers Trust Funds and the Cement Masons Trust Funds ("the Trust Funds"). The Trust Funds are multiemployer pension plans within the meaning of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA").

On April 1, 1983, the Company offered to meet and bargain for a new contract with the Unions as an individual employer. The Company also notified the Unions that it would not be bound by the multiemployer collective bargaining agreements after their expiration date of June 15, 1983. Neither of the Unions made any attempt to commence negotiations

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<sup>1</sup> The manner and extent to which the Unions availed themselves of the Company's bargaining invitation is in dispute. While the Trust Funds claim that no bargaining impasse was reached, the Company asserts the existence of a bargaining impasse. Alternatively, the Company contends that the Unions did not assert their bargaining rights in a timely fashion or did not meet their bargaining obligations under Sections 8(b)(3) and (d) of the National Labor Relations Act, which in either event privileged the Company to unilaterally cease contributions, notwithstanding the alleged absence of a bargaining impasse.

On June 15, 1983, the old multiemployer collective bargaining agreements expired without new agreements to take their place. Accordingly, as of mid-June 1983, there existed *no contracts obliging the Company to continue contributions and the Company ceased making contributions to the Trust Funds.*

Beginning in December 1983, the Trust Funds filed a series of suits against the Company for the post-June 15 contributions. In each of these cases the Trust Funds claimed that the Company's actions violated Section 515 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1145. Jurisdiction was asserted under Section 502 of ERISA, 29 U.S.C. § 1132, and Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. The Company denied that it was obligated to make contributions after June 15, 1983 and denied that the district court had subject matter jurisdiction. Without reaching the first of these issues, the district court granted the Company's motion for summary judgment based upon the exclusive jurisdiction of the National Labor Relations Board ("NLRB") and the Ninth Circuit's decision in *Cement Masons Health And Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F.Supp. 942 (N.D.Cal. 1981), *aff'd*, 629 F.2d 641 (9th Cir. 1982).

The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision because the Company's obligation to continue contributions (and its alleged violation of ERISA) derived solely from a possible violation of Section 8(a)(5) of the National Labor Relations Act ("NLRA") falling within the exclusive jurisdiction of the NLRB.

## SUMMARY OF ARGUMENT

As correctly found by the Ninth Circuit and every other circuit to address the issue, nothing in ERISA, and more specifically nothing in ERISA Section 515, requires an employer to continue trust fund contributions after the expiration of the contract which contains the employer's promise to make such contributions. That obligation, if any, derives solely from the employer's statutory duty to bargain under Sections 8(a)(5) and (d) of the NLRA. Violations of Sections 8(a)(5) and (d) are unfair labor practices falling within the exclusive jurisdiction of the NLRB.

## REASONS FOR DENYING THE WRIT.

### 1. THE NINTH CIRCUIT'S DECISION COMPORTS WITH THE PURPOSES AND POLICIES OF ERISA, AND DOES NOT RAISE NOVEL ISSUES REQUIRING THIS COURT'S REVIEW.

The Trust Funds misstate the effect that the Ninth Circuit's decision will have on trust funds and trustees under ERISA. Contrary to the Trust Funds' assertions, this case does not involve a tension between ERISA and the NLRA. ERISA does *not* require an employer to establish a plan nor to continue a plan indefinitely. Rather, ERISA is primarily concerned with the elements of a plan and its administration *after* it is established by the employer in order to ensure that the worker who is promised a benefit receives that benefit. *NLRB v. AMAX Coal Co.*, 453 U.S. 322, 336 (1981) (trustees cannot require employer contributions not required by the original collective bargaining agreement). See also, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 91 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981); *Viggiano v. Shenango China Division of Anchor Hocking Corporation*, 750 F.2d 276, 279 (3rd Cir. 1984). Accordingly, unlike the NLRA, nothing in ERISA compels an employer to continue contributions once the agreement containing the employer's promise to contribute expires.

Section 515 of ERISA—the linchpin for all of the Trust Funds' arguments—does not alter this result. Section 515 provides that:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan, or under the terms of a collective bargaining agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

Congress enacted this Section for a very specific purpose. The Senate Committee on Labor and Human Resources explained that the provision was added to ERISA because "simple collection actions brought by Plan trustees have been converted

into lengthy, costly and complex litigation concerning claims and defenses *unrelated to the employer's promise* and the plan's entitlement to the contributions" and because steps had to be taken to "simplify delinquency collection."<sup>2</sup>

Section 515's plain wording and its legislative history show that it was enacted for the sole purpose of precluding an employer from asserting legal defenses unrelated or extraneous to its promise to contribute in suits to recover delinquent contributions. It was not, however, intended to be a substitute for that promise or to create a new and independent obligation to continue contributions after the expiration of the promise initially giving rise to the obligation.<sup>3</sup> For that reason, every court of appeals to address the issue has held that an employer's failure to maintain the status quo with respect to contribu-

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<sup>2</sup> Senate Committee on Labor and Human Resources, S. 1076—The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, 96th Cong., 2d. Sess., 44 (Comm Print, Apr. 1980) (1980 Senate Labor Committee Print) (emphasis added). See also, *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 87 (1982).

<sup>3</sup> In an effort to avoid 515's plain wording and legislative intent, the Trust Funds argue that the Company's obligation to make contributions under Section 515 must be defined by Section 4212(a) of ERISA, 29 U.S.C. § 1392. However, Section 4212(a) specifically provides that its definition of an employer's obligation to contribute applies *only* for the limited purpose of determining withdrawal liability under ERISA. Accordingly, Section 4212(a) has absolutely no application to the instant case which concerns only alleged delinquencies and not employer withdrawal. See, *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894, 900-01 (3rd Cir. 1986), citing with approval the reasoning and language in *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F.Supp. 1441, 1445 (W.D. Mo. 1985):

It is clear from the definitions given in the part relating to employer withdrawal that Congress was well aware that an obligation to contribute could arise under agreements made by the parties or arise under duties imposed by labor-management relation law. Congress chose to include both types of obligations in determining withdrawal liability, but chose to create a cause of action and provide special damages for recovery of delinquent contributions only if those contributions were due under an agreement entered into by the employer.

It is because of the clarity of the definition in Title IV [Withdrawal Liability] that plaintiff's argument differentiating between obligations under the terms of a contract and obligations under the contract itself must fail. The Court does not accept the argument that Congress would use an ambiguous, metaphysical concept to define an obligation when it has used a crystal clear definition elsewhere in the same act. . . .

tions after termination of a collective bargaining agreement does not violate Section 515 or any other section of ERISA. *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3rd Cir. 1986); *U.A. 198 Health & Welfare Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Office and Professional Employees Insurance Trust Fund v. Laborers Funds Administrative Office*, 783 F.2d 919 (9th Cir. 1986). See also, *Pattern Makers' Pension Trust Fund v. Badger Pattern Works, Inc.*, 615 F.Supp. 792 (N.D. Ill. 1985); *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F.Supp. 1441 (W.D.Mo. 1985).

## **2. THE TRUST FUNDS' CLAIMS, IF ANY, DERIVE SOLELY FROM THE NATIONAL LABOR RELATIONS ACT AND FALL WITHIN THE EXCLUSIVE JURISDICTION OF THE NLRB.**

The Trust Funds' claims depend entirely on the assertion that the Company and Unions did not bargain to impasse before the Company ceased making contributions. (Pet. 3.) These claims derive solely from Sections 8(a)(5) and (d) of the National Labor Relations Act, which impose a statutory bargaining duty after the expiration of a collective bargaining agreement. See, *NLRB v. Katz*, 369 U.S. 736 (1962); *Peerless Roofing Co., Ltd. v. NLRB*, 641 F.2d 734 (9th Cir. 1981). This Court has long held that such unfair labor practices fall within the special competence and exclusive jurisdiction of the NLRB. See, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86 ("...[O]nly the Board may provide affirmative remedies for unfair labor practices. . . .").

Moreover, the present case poses significant factual and legal issues concerning the parties' bargaining duties under the NLRA which require the Labor Board's determination. Whether or not a bargaining impasse exists and for what purposes is a highly sophisticated and difficult issue which must be determined by the Board:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties

in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exist[s].

*Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967).

Further complicating the resolution of this case are the affirmative defenses raised by the Company. The Company contends that the Unions either waived their bargaining rights or failed to bargain in good faith in violation of Sections 8(b)(3) and (d) of the NLRA, and that in either event, the Company was privileged to make unilateral changes regardless of impasse. These defenses pose a number of subtle factual questions, and difficult issues of law on which the NLRB has had little or no occasion to rule.<sup>4</sup>

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<sup>4</sup> The NLRB has found that an employer is free to make unilateral changes where a union waives its rights to bargain. See, *NLRB v. Katz*, 369 U.S. at 747-48. "A union cannot charge an employer with refusal to negotiate when it has not made an attempt to bring the employer to the bargaining table." *NLRB v. Alva Allen Industries, Inc.*, 369 F.2d 310, 321 (9th Cir. 1966), citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939). However, the Board has never determined whether a union's failure to bargain in good faith also privileges unilateral changes in working conditions. Unilateral changes under such circumstances appear justified under Section 8(d) of the NLRA, which defines the duty to bargain as the "performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment . . ." (Emphasis added.) A union that fails to bargain and to satisfy this mutual obligation cannot later be permitted to complain about the employer's failure to bargain before making unilateral changes in working conditions. Were a union permitted to make such claims, it would benefit from its own failure to meet statutory obligations, thereby undermining the entire collective bargaining process and frustrating the purposes of the Act.

Such fundamental questions of federal labor policy under the National Labor Relations Act must be determined in the first instance by the body statutorily charged with administering the Act, the NLRB.<sup>5</sup>

<sup>5</sup> Despite the Trust Funds' assertions, they would not be prejudiced by resorting to the Board. The Trust Funds, like any other person, have "standing" to take unfair labor practice charges to the Board. 29 U.S.C. § 160(b); 29 C.F.R. § 102.9. As charging parties, the Trust Funds would have every opportunity to participate in the NLRB's unfair labor practice proceedings, to be represented at trial by counsel, to call and examine witnesses, to cross-examine witnesses, and to introduce evidence. 29 C.F.R. §§ 102.35(i) and 102.38. The Trust Funds could also present oral argument and submit post-trial briefs to the administrative law judge and, in the event of an adverse ruling, file exceptions with the Board. 29 C.F.R. § 102.48. Indeed, if dissatisfied with the Board's decision, the Trust Funds could appeal that decision to the Court of Appeals. 29 U.S.C. § 160(f). That these procedures may differ from those available to the Trust Funds in court litigation does not disqualify the NLRB as the appropriate forum for the Trust Funds' claims. These claims allege unfair labor practices which fall within the NLRB's exclusive jurisdiction and which must be remedied in a manner consistent with the comprehensive scheme devised by Congress. To the extent that the Board's exclusive jurisdiction over these claims causes problems for the Trust Funds, those problems are the result of congressional choice and should be addressed not by the Court, but by congressional action. See, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 106 (1983).

## CONCLUSION

The Ninth Circuit's decision below does not decide a question of federal law which should be settled by the Court. The Court of Appeals' decision comports with the basic tenets of ERISA and the NLRA, and with this Court's decisions interpreting those statutes. The decision is consistent with every other Court of Appeals' decision dealing with this issue. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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July 1986

**APPENDIX A**

**SUPPLEMENTAL STATUTE**

**National Labor Relations Act, Section 8(b)(3)**

Section 8(b)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(3), provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

....  
(3) to refuse to bargain collectively with an employer; provided it is the representative of his employees subject to the provisions of section 9(a) [29 U.S.C. § 159(a)].

E I L E D

No. 85-2079

JAN 30 1987

JOSEPH F. SPANIOL, JR.  
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

LABORERS HEALTH AND WELFARE TRUST FUND,  
FOR NORTHERN CALIFORNIA, ET AL., PETITIONERS

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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2718

### **QUESTION PRESENTED**

Whether a federal district court has jurisdiction under Sections 502 and 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132 and 1145, over an action by the trustees of multiemployer employee benefit plans to collect contributions from a delinquent employer, where the employer's alleged obligation to make contributions arises from its duty under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5), to refrain from unilaterally changing terms and conditions of employment during post-contract expiration collective bargaining.

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v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI  
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FOR THE NINTH CIRCUIT**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

**STATEMENT**

1. Petitioners are multiemployer employee benefit plans (Pet. 2). They were established by collective bargaining agreements and trust agreements between the Northern California District Council of Laborers and certain multiemployer bargaining associations representing construction industry employers in Northern California, and between the District Council of Plasterers and Cement Masons of Northern California and the same multiemployer associations (*ibid.*). From at least 1980 to 1983, respondent, Advanced Lightweight Concrete Company, Inc., was a member of one of these multiemployer bargaining associations, Associated General Contractors of California (AGC), and thus was a party to AGC's collective bargaining agreements with the two unions (*id.* at 2-3; Pet. App. A2-A3). Those agreements required respondent

to make specified monthly contributions to petitioners for each hour that its covered employees worked (*id.* at A4).

By letter dated April 1, 1983, respondent notified the unions that it was withdrawing bargaining authority from AGC (Pet. 3; Pet. App. A4). Respondent indicated that it was ready to negotiate independently with the unions (*id.* at A4-A5; Pet. 3), but that it would not be bound by AGC's master agreements, or any of its successor agreements, after June 15, 1983, the expiration date of the extant agreements (Pet. App. A4). While the subsequent bargaining history between respondent and the unions is unclear (*id.* at A5 & n.1), it is undisputed that respondent did not enter into any new collective bargaining agreements with the unions (*id.* at A5-A6) and ceased making contributions to petitioners on June 15, 1983 (*ibid.*). In November 1983, the Regional Director of the National Labor Relations Board (NLRB) refused to issue a complaint based on a charge by one of the unions that respondent had failed to bargain in good faith (*id.* at A5 n.1).

2. In December 1983, petitioners filed suit against respondent in the United States District Court for the Northern District of California, seeking to collect unpaid contributions for the period after June 15, 1983, while post-contract expiration negotiations were pending (Pet. 3). Petitioners alleged, *inter alia*, that respondent was bound under Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5), to honor during that period the contribution obligations established by the expired collective bargaining agreements, and that the court had jurisdiction under Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185, and Sections 502 and 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132, 1145, to enforce this obligation (Pet. App. A6-A7; Pet. 3). Respondent answered, *inter alia*, that any obligation it might

have under the NLRA was not within the jurisdiction of the district court and that, in any event, its negotiations with the unions were at "impasse" and it therefore had no NLRA-based contribution obligation (Br. in Opp. 2 n.1, 3). The court granted summary judgment for respondent, relying on *Cement Masons Health & Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F. Supp. 942 (N.D. Cal. 1981), aff'd for the reasons stated in the district court's opinion, 692 F.2d 641 (9th Cir. 1982). Pet. App. A7-A8; Pet. App. B.

3. The court of appeals affirmed on the ground that the district court had no jurisdiction under either Section 301 or ERISA (Pet. App. A1-A36). It acknowledged that "an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the [NLRA]" (Pet. App. A9-A10). But, it said, "a collective bargaining agreement does not 'survive' [its expiration] in the sense that it continues as a legally operative document" (*id.* at A12). Rather, the court said, "the agreement's terms 'survive' in order to define the parameters of the employer's obligation under section 8(a)(5) to maintain the status quo during negotiations" (*ibid.*). Accordingly, the court found that respondent was entitled to "summary judgment on the trust funds' section 301-based causes of action" (Pet. App. A16), since petitioners' suit sought to enforce rights created by the NLRA and not rights created by a collective bargaining agreement (*id.* at A12-A13, A16).

The court then turned to the question whether the district court had jurisdiction under Sections 502 and 515 of ERISA to enforce respondent's alleged NLRA-based post-contract expiration contribution obligation (Pet. App. A16-A31). The court noted that Section 502 confers jurisdiction on the district courts to enforce obligations

arising under Section 515 (Pet. App. A17 n.7) and that Section 515 requires an employer “‘who is obligated to make contributions to a multiemployer plan \* \* \* under the terms of a collectively bargained agreement [to] \* \* \* make such contributions in accordance with the terms and conditions of \* \* \* such agreement’” (Pet. App. A16, quoting 29 U.S.C. 1145).<sup>1</sup> The court further noted that “a phrase similar to ‘obligated to make contributions,’ which appears in section 515, is defined elsewhere in [Section 4212(a) of] ERISA as ‘an obligation to contribute arising \* \* \* (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law’” (*id.* at A21 (quoting 29 U.S.C. 1392(a))), and that “[s]ubpart 2 of this definition would seem to include obligations created by section 8(a)(5)” of the NLRA (*ibid.*)). But the court observed that Section 4212(a)’s definition of “obligation to contribute” is applicable only to the part of ERISA that imposes liability on employers upon withdrawal from multiemployer pension plans (Pet. App. A21-A22)<sup>2</sup> and said that “the similarity between the phraseology in section

<sup>1</sup> Section 515 of ERISA, 29 U.S.C. 1145, provides that:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

<sup>2</sup> Section 4212(a) of ERISA, 29 U.S.C. 1392(a), provides that:

For purposes of this part, the term “obligation to contribute” means an obligation to contribute arising—

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

515 and that in [the first subpart of the Section 4212(a) definition indicates] \* \* \* that Congress intended section 515 liability to be less extensive than withdrawal liability” (*id.* at A23-A24). Finally, the court found “[n]o indication \* \* \* that, during its deliberations \* \* \*, Congress even considered the problem of continuing obligations from expired agreements much less tha[t] it had a view on resolving any conflict between section 515 and the primary jurisdiction of the NLRB” (*id.* at A25-A26 (footnote omitted)).

In the absence of “useful statutory or Congressional guidance on section 515” (Pet. App. A31), the court concluded that “the matter [had to] be decided by the application of accepted labor law principles” (*ibid.*). The court then said that, “[w]hen presented with a dispute that involves adjudicating conduct which ‘is arguably within the compass of [Section] 7 or [Section] 8 of the NLRA,’ a federal court must defer to the primary jurisdiction of the NLRB” (*id.* at A31-A32 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959))). Applying this principle, the court determined that respondent’s “failure to pay contributions after the master agreements’ expiration is, at least, an arguable unfair labor practice” (Pet. App. A33); that, “[w]hile admittedly the failure to pay may also violate section 515 of ERISA, adjudication of the merits depends entirely on the section 8(a)(5) determination” (*id.* at A33-A34); and that “[m]aking this underlying labor law determination is exclusively an NLRB matter” (*id.* at A34 (footnote omitted))). Accordingly, having found “no persuasive evidence in either the plain words or legislative history of ERISA \* \* \* that Congress intended section 515 to be an exception to the general rule of NLRB preemption” (*id.* at A35-A36), the court held that “the primary jurisdiction of the [NLRB] preempts [petitioners’] \* \* \* suit in district court under

sections 502 and 515 of [ERISA] to recover delinquent contributions accrued after a collective bargaining agreement has expired" (*id.* at A2).

## DISCUSSION

Petitioners contend that Section 502 and 515 of ERISA give the district court jurisdiction over their action to collect contributions from respondent, where respondent's alleged obligation to contribute arises from its duty under the NLRA to refrain from unilaterally changing terms and conditions of employment during post-contract expiration collective bargaining.<sup>3</sup> This question is of immense practical importance to the administration and solvency of multiemployer employee benefit plans, and we believe the courts below erred in ruling that the district court lacked jurisdiction. Accordingly, we submit that the question warrants review by the Court at this time.

1. We start with the conclusion of the court of appeals that "the primary jurisdiction of the [NLRB] preempts [petitioners'] suit in district court under sections 502 and 515 of [ERISA] to recover delinquent contributions accrued after [the] collective bargaining agreement[s] ha[d] expired" (Pet. App. A2). We agree with the court that "[respondent's] failure to pay contributions after the master agreements' expiration [was], at least, an arguable unfair labor practice" (*id.* at A33) and that "adjudication of the merits [of petitioners' claims] depends entirely on the sec-

<sup>3</sup> Petitioners do not appear to contend in this Court that either the expired collective bargaining agreements or the pension plan documents require respondent to make such post-contract expiration contributions. Cf. *Pattern Makers' Pension Trust Fund v. Badger Pattern Works, Inc.*, 615 F. Supp. 792 (N.D. Ill. 1985) (fiduciary may enforce terms of pension plan against employer even though collective bargaining agreement has expired).

tion 8(a)(5) determination" (*id.* at A34). We do not agree, however, that "this underlying labor law determination is exclusively an NLRB matter" (*ibid.*).

This Court has previously recognized that Congress has granted federal courts jurisdiction in certain circumstances to adjudicate NLRA-based rights. See *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-86 (1982); *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 635 n.17 (1975). In *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964), the Court held that, in Section 303 of the LMRA (29 U.S.C. 187), Congress authorized the federal courts to award damages to any person injured by a violation of Section 8(b)(4) of the NLRA (29 U.S.C. 158(b)(4)), even though the NLRB has concurrent jurisdiction to remedy such unfair labor practices. Similarly, in *Smith v. Evening News Ass'n*, 371 U.S. 195, 197 (1962), the Court found that "[t]he authority of the [NLRB] to deal with an unfair labor practice which also violates a collective bargaining agreement is not displaced by [Section] 301 [of the LMRA], but it is not exclusive and does not destroy the jurisdiction of the courts in suits under [Section] 301." See also *Vaca v. Sipes*, 386 U.S. 171 (1967) (federal court may adjudicate duty of fair representation claim in a suit under Section 301 of the LMRA even though the NLRB has concurrent jurisdiction under the NLRA to adjudicate such a claim). These cases show that federal courts in fact have jurisdiction to decide unfair labor practice questions "where it [cannot] be inferred that Congress intended exclusive jurisdiction to lie with the NLRB" (386 U.S. at 179).

This case presents the question whether, in Sections 502 and 515 of ERISA, Congress granted federal courts jurisdiction to enforce an obligation to make contributions to a pension fund where the source of that obligation is the NLRA. While neither the text nor the legislative history of these sections speaks directly to this question, we believe that the better reading of the sections is that

they confer such jurisdiction, including, in this instance, the power to decide whether respondent unilaterally changed terms and conditions of employment prior to reaching "impasse" in its negotiations with the unions, in violation of Section 8(a)(5) of the NLRA.

2. Section 502 of ERISA gives federal district courts jurisdiction over, *inter alia*, civil actions by plan fiduciaries to enjoin violations of Subchapter I of ERISA, to redress such violations, and to enforce the provisions of Subchapter I. Section 515 is part of Subchapter I of ERISA. See 29 U.S.C. 1145. The question, therefore, is whether Section 515 covers an employer's obligation under Section 8(a)(5) of the NLRA to continue to make contributions to the plan, in accordance with the terms of an expired agreement, during post-contract expiration collective bargaining.

a. Section 515 states that "[e]very employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement" (29 U.S.C. 1145). But the phrase "obligated to make contributions \* \* \* under the terms of a collectively bargained agreement" is ambiguous. The phrase could be read to refer only to contribution obligations that arise from the collective bargaining agreement itself. See *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F. Supp. 1441, 1444-1446 (W.D. Mo. 1985). On the other hand, the phrase may refer to any contribution obligation that is defined by "*the terms of a collectively bargained agreement.*" On that view, Section 515 would encompass an NLRA-based contribution obligation, since that obligation would be defined by "*the terms of a collectively bargained agreement.*" See *Laborers Health & Welfare Trust Fund v. Hess*, 594 F. Supp. 273, 279-280

(N.D. Cal. 1984); see generally *American Distributing Co. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984) (emphasis added) (under the NLRA, "an employer is required to maintain the status quo and make payments in conformity with *the terms of an expired written agreement*"); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970) (emphasis added) ("[s]ince the status quo is quite obviously defined by reference to the substantive *terms of the expired contract*, it follows that, in a limited and special sense, those pertinent contractual terms 'survive' the expiration date").

Where more than one interpretation of statutory language is plausible, this Court has said that it will search for the "interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested" (*Commissioner v. Engle*, 464 U.S. 206, 217 (1984), quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part)). Accordingly, to determine whether Congress intended to make NLRA-based contribution obligations independently enforceable in direct, ERISA-based, federal court actions, we turn to the circumstances surrounding Section 515's enactment and to the place that Section 515 has in the overall ERISA scheme.

b. Congress enacted Section 515 as part of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-264, 94 Stat. 1208 *et seq.* In MPPAA, Congress attempted to address comprehensively the "problems which tend to discourage the maintenance and growth of multiemployer pension plans" (29 U.S.C. 1001a(c)(2)), and "to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans" (29 U.S.C. 1001a(c)(3)). To that end, Congress revised the system by

which the Pension Benefit Guaranty Corporation guarantees benefits to participants in multiemployer plans, mandated that employers withdrawing from multiemployer plans contribute whatever share of the plans' unfunded vested liabilities is attributable to their employees' prior participation in the plans, and created new federal enforcement mechanisms to facilitate the collection of both delinquent contributions and withdrawal liabilities. See 29 U.S.C. 1132(g)(2), 1145, 1322a-1322b; 29 U.S.C. (& Supp. III) 1381-1461. Section 515 is the enforcement mechanism that Congress created to facilitate the collection of delinquent contributions.

Delinquencies were among “[t]he most significant, and the oldest, day-to-day problem[s] faced by multiemployer plans” (*Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 391 (1977) (testimony of Theodore Groom)), and Congress had studied them for some time.<sup>4</sup> During the course of this

study, Congress learned that, where delinquencies occur, plans lose investment income, incur increased administrative expenses (for detecting and collecting delinquencies), have greater difficulty formulating and meeting funding standards, and must require nondelinquent employers to fund the pensions of delinquent employers' employees. See 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); Staff of the Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980, S. 1076: Summary and Analysis of Consideration* 43-44 (Comm. Print. 1980) [hereinafter cited as *Comm. Print*].<sup>5</sup> Moreover, Congress found that “[r]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly” (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)).<sup>6</sup> Thus, those who proposed and supported Section 515's enactment described it as a mechanism that would “permit trustees to recover delinquent contributions ef-

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<sup>4</sup> See, e.g., *Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 391-394 (1977); *ERISA Improvements Act of 1978: Joint Hearings on S. 3017 Before the Subcomm. on Labor and Human Resources and the Subcomm. on Private Pension Plans and Employee Fringe Benefits of the Senate Comm. on Finance*, 95th Cong., 2d Sess. 123 (1978); *Multiemployer Pension Plan Amendments Act of 1979: Hearings on S. 1076 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 523 (1979); *Multiemployer Pension Plan Termination Insurance Program: Hearing Before The Subcomm. on Oversight of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 121-122 (1979); *The Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 772, 808 (1979); *The Multiemployer Pension Plan Amendments Act of 1979: Hearing on H.R. 3904 Before the House Comm. on Ways and Means*, 96th Cong., 2d Sess. 193 (1980).

<sup>5</sup> The Staff of the Senate Committee on Labor and Human Resources explained that:

Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.

*Comm. Print* 43-44.

<sup>6</sup> The Staff of the Senate Committee on Labor and Human Resources explained that “[s]ome simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions” (*Comm. Print* 44).

ficaciously" (*id.* at 23288 (remarks of Sen. Williams)), "foster the preservation of the private multiemployer plan system \*\*\* [by] discourag[ing] delinquencies and simplify[ing] delinquency collection" (*Comm. Print* 44), and "clarify the law \*\*\* by providing a direct, unambiguous ERISA cause of action to a plan against a delinquent employer" (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)).

Nothing in the legislative history of MPPAA indicates that Congress intended to limit the provisions of Section 515 to the enforcement of contractually based contribution obligations. Nor does the legislative history indicate that Congress intended to require trustees to recover pre-contract expiration and post-contract expiration delinquencies in different forums. Rather, the comments in the legislative history, while not speaking directly to the present issue, suggest an intention to provide plan trustees with a single, efficient cause-of-action for collecting all delinquent contributions, whatever the source of the obligation to contribute or the timing of the delinquency. See, e.g., 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams).

c. Our belief that Section 515 was intended to cover NLRA-based contribution obligations is fortified by the definition of "obligation to contribute" that appears in Section 4212(a) of ERISA. Section 4212(a) provides that an employer has an "obligation to contribute" when it has "an obligation to contribute arising (1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law \*\*\*" (29 U.S.C. 1392(a)). As a result of the second clause of Section 4212(a), arbitrators and courts making withdrawal liability determinations plainly are required to take into account an employer's continuing NLRA-based contribution obligation (and are thus required to address the underlying Section 8(a)(5) question).

See *Comm. Print* 12-14; *Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691, 695 (9th Cir. 1986) (remanding for determination whether parties reached "impasse" before or after the effective date of MPPAA withdrawal liability provisions); *I.A.M. National Pension Trust Fund v. Schulze Tool & Die Co.*, 564 F. Supp. 1285, 1289-1296 (N.D. Cal. 1983) (court must decide "impasse" question in resolving withdrawal liability issue). The definition of "obligation to contribute" that appears in Section 4212(a) expressly applies only "[f]or purposes of [the withdrawal liability] part" of ERISA (29 U.S.C. 1392(a)). That definition may therefore "not apply elsewhere in the Act [by its] own force" (*Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 370 n.14 (1980)). But that definition "may otherwise reflect the meaning of the term[] defined as used in other Titles" of ERISA (*ibid.*). Because the delinquent contribution and withdrawal liability provisions were enacted at the same time and play complementary roles in the MPPAA scheme, we believe the better reading is that the term "obligated to make contributions," which appears in Section 515, has a meaning comparable to the phrase "obligation to contribute," which appears in Section 4212(a).<sup>7</sup>

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<sup>7</sup> The legislative history of the two provisions neither confirms nor refutes the point. The withdrawal liability provisions were introduced simultaneously in both houses of Congress on May 3, 1979. See H.R. 3904, 96th Cong., 1st Sess. (1979), reprinted in *The Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 3 (1979); S. 1076, 96th Cong., 1st Sess. (1979), reprinted in *Multiemployer Pension Plan Amendments Act of 1979: Hearings Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 3 (1979). Neither bill contained a provision concerning delinquent employer contributions. See S. 1076, 96th Cong., 1st Sess. (1979); H.R. 3904, 96th Cong., 1st Sess. (1979).

In enacting MPPAA, Congress was particularly concerned that employers not escape their obligation to fund the pensions that multiemployer plans would be liable to pay the employers' employees. See 126 Cong. Rec. 23288 (1980) (remarks of Sen. Williams); *id.* at 23039 (remarks of Rep. Thompson); *id.* at 20180 (colloquy between Sen. Williams and Sen. Matsunaga). Accordingly, in Section 515, the delinquent contribution provision, Congress mandated that, when an employer has become "obligated to make contributions," it "shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan \* \* \*." Comitantly, in the withdrawal liability provisions, Congress mandated that, when an employer "withdraws from a multiemployer plan in a complete withdrawal[,] \* \* \* the employer [shall be] liable to the plan" for a portion of the plan's unfunded vested benefits such that the burden of its employees' pensions will not fall on the remaining employers or plan beneficiaries (29 U.S.C. 1381(a)(1)). Importantly, Congress provided that a "complete withdrawal" would be deemed to occur only when the employer has "permanently cease[d] to have an obligation to contribute under the plan" (29 U.S.C. 1383(a)(1)).

Applying different definitions to the contribution obligations identified in the delinquent contribution and withdrawal liability provisions would leave an unwarranted gap in this "comprehensive and reticulated" scheme

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The provision for delinquent contributions was added later by floor leaders in both houses. 126 Cong. Rec. 23039 (1980); *id.* at 23288. The legislative history does not directly discuss the connection between the delinquent contribution and withdrawal liability provisions, except to state that they should be enforced in the same manner. See *The Multiemployer Pension Plan Amendments Act of 1979: Hearings on H.R. 3904 Before the Task Force on Welfare and Pension Plans of the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 1st Sess. 808 (1979); 126 Cong. Rec. 23039 (1980); *id.* at 23288-23289.

(*Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. at 361). ERISA would provide plan trustees with an independent means for enforcing an employer's obligations arising during the term of the underlying collective bargaining agreement and for enforcing an employer's obligation to pay withdrawal liability, but ERISA would not provide plan trustees with an independent means for enforcing an employer's obligation to fund its employees' pensions between the expiration date of the employer's collective bargaining agreement and the date of the employer's complete withdrawal from the plan, even though the employer would *have* such an obligation and even though ERISA would require plan trustees to credit all employee service performed during that period. See 29 U.S.C. 1053(b)(1)(G) ("all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account"); *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, No. 82-2157 (June 19, 1985), slip op. 6-7 n.7 (quoting Dep't of Labor Advisory Op. 78-28A (Dec. 5, 1978), reprinted in Pens. Rep. (BNA) No. 221, at R-25 (Jan. 8, 1979)). We find no evidence that Congress intended to leave such a gap in the provisions it enacted specifically to address the many "problems which tend to discourage the maintenance and growth of multiemployer pension plans" and to "provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans" (29 U.S.C. 1001a(c)(2) and (3)).<sup>8</sup>

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<sup>8</sup> To the contrary, we note that Congress provided that, for purposes of federal court enforcement, the delinquent contribution and withdrawal liability provisions should be "treated in the same manner" (29 U.S.C. 1451(b)). See also 29 U.S.C. 1401(d) ("if the employer fails to make timely payment in accordance with such final decision, the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 1145 of this title)").

d. To be sure, the trustees could file a charge with the NLRB seeking to recover delinquent contributions in that forum. But we do not believe that Congress intended trustees to have only this limited recourse.

The NLRA enforcement scheme is designed to facilitate the resolution of labor disputes, not the collection of delinquent contributions. The NLRA, for example, vests the NLRB's General Counsel with "unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca v. Sipes*, 386 U.S. at 182. Thus, requiring multiemployer pension plan trustees to resort to the NLRB may, in some circumstances, mean that they have no recourse for collecting delinquencies at all. Moreover, even where the General Counsel issues an unfair labor practice complaint, the NLRB does not allow interested third parties such as plan trustees to obtain discovery. See C. Morris, *The Developing Labor Law* 1625 (1983). In addition, the NLRA authorizes the General Counsel and NLRB to settle unfair labor practice charges without obtaining the charging party's consent and for less than "make-whole" relief. See 29 U.S.C. 160(c); 29 C.F.R. 101.2, 101.4, 101.9(c). Thus, the trustees' interest in fully collecting all contributions owed to a pension plan may be compromised. Cf. *NLRB v. Amax Coal Co.*, 453 U.S. 322, 337 (1981) (trustees have "obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer for the sole benefit of the beneficiaries of the fund"). Finally, the NLRB cannot impose any type of punitive sanction. See *Wisconsin Dep't of Industry, Labor & Human Relations v. Gould*, No. 84-1484 (Feb. 26, 1986), slip op. 5-6 & n.5. It therefore has only a limited ability to deter employers from becoming delinquent in the first place.

In contrast, the ERISA enforcement scheme is specially designed to "foster the preservation of the private multiemployer plan system \* \* \* [by] discourag[ing] delin-

quencies and simplify[ing] delinquency collection" (*Comm. Print* 44). Section 515 provides trustees with a direct, unambiguous cause-of-action for collecting delinquencies. The trustees have exclusive control over the action and thus no third party can compromise their interest in collecting all contributions owed to a plan. See *NLRB v. Amax Coal Co.*, 453 U.S. at 336. Moreover, liberal rules of discovery govern the action and provide trustees with a means for determining whether and to what extent contributions are actually owing and delinquent. Finally, Section 502(g)(2) of ERISA requires courts, where trustees are victorious, to award reasonable attorney's fees, costs, unpaid contributions, interest on the unpaid contributions, and an additional amount equal to the greater of interest or specified liquidated damages. See 29 U.S.C. 1132(g)(2). Thus, the ERISA enforcement scheme adds some important muscle to the trustees' struggle against delinquent contributors and delinquent contributions.

When Congress created this special enforcement scheme, it stated that "recourse available under current law for collecting delinquent contributions [was] insufficient and unnecessarily cumbersome and costly" (126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson)). NLRB enforcement proceedings were part of the then-available recourse. Accordingly, we do not believe that Congress intended to require plan trustees to resort to the NLRB for enforcement of NLRA-based contribution obligations. Rather, Congress presumably expected that Section 515 would cover these obligations as well.

3. Although its opinion is not altogether clear on the point (compare Pet. App. A21-A26 with A26 n.12 and A33-A34), the court below at one point acknowledged that "the failure to pay may also violate section 515 of ERISA" (*id.* at A33). It found, however, that the language and legislative history of Section 515 are sufficiently ambiguous to require that its interpretation be resolved by

reference to "accepted labor law principles," specifically, the principle that the NLRB has primary jurisdiction to resolve unfair labor practice questions. See Pet. App. A31-A32. We do not think that the question of Congress's intent under Section 515 can be resolved in this fashion.

As a general rule, of course, the NLRA does vest the NLRB with primary jurisdiction to decide unfair labor practice questions. "Congress \* \* \* considered that centralized administration of specially designed procedures was necessary to obtain uniform application of [the NLRA's] substantive rules and to avoid th[ose] diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies" (*Garner v. Teamsters Union*, 346 U.S. 485, 490 (1953)). As we noted above, however, Congress has occasionally determined that this concern for uniformity of decision should yield to other considerations and, in such situations, has established independent mechanisms for enforcing particular NLRA-based rights. See, e.g., *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964) (29 U.S.C. 187 creates an independent basis for enforcing the prohibitions set forth in Section 8(b)(4) of the NLRA); *Vaca v. Sipes*, 386 U.S. 171 (1967) (29 U.S.C. 185 creates an independent basis for enforcing the duty of fair representation embodied in Section 9(a) of the NLRA, 29 U.S.C. 159(a)). Thus, reference to general primary jurisdiction rules merely begs the question whether "Congress intended exclusive jurisdiction to lie with the NLRB" (*Vaca v. Sipes*, 386 U.S. at 179). Rather, the question whether the concern for uniformity of decision should yield to other considerations must be determined by reference to the language, legislative history, and purposes of the federal statute alleged to create the independent enforcement mechanism—in this instance, Section 515 of ERISA.<sup>9</sup>

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<sup>9</sup> Ordinarily, of course, "assessing the significance of impasse and the dynamics of collective bargaining is precisely the kind of judgment

4. In our view, the language, legislative history, and purposes of Section 515 of ERISA compel the conclusion that Congress created an independent mechanism for enforcing contribution obligations arising out of the NLRA-based duty to refrain from unilaterally changing terms and conditions of employment during post-contract expiration collective bargaining. The court below is not alone, however, in reaching a contrary judgment. See, e.g., *Moldovan v. Great Atlantic & Pacific Tea Co.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F. Supp. 1441 (W.D. Mo. 1985); *Pattern Makers' Pension Trust Fund v. Badger Pattern Works, Inc.*, 615 F. Supp. 792 (N.D. Ill. 1985); but see *Laborers Health & Welfare Trust Fund v. Hess*, 594 F. Supp. 273 (N.D. Cal. 1984). These decisions spell serious adverse consequences for the financial stability of multiemployer plans, which are as adversely affected by post-contract expiration delinquencies as they are by pre-contract expiration delinquencies. Given the congressional interest reflected in MPPAA in maintaining the

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that \* \* \* should be left to the Board" (*Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 413 (1982)). Accordingly, a federal court ordinarily should refrain from deciding any "impasse" question that is pending before the NLRB. See *Northern California District Council of Hod Carriers v. Opinski*, 673 F.2d 1074, 1075-1076 (9th Cir. 1982). Thus, if the General Counsel has issued a complaint concerning a bad faith bargaining charge filed by either the trustees of a plan or a union, a federal court concurrently considering a Section 515 enforcement action by the trustees should presumably refrain from deciding the impasse issue and await that issue's resolution by the NLRB. The NLRB decision would be binding in the trustees' federal court action, provided that the trustees had an adequate opportunity to litigate the issue in the NLRB proceeding. See *Carey v. Westinghouse Corp.*, 375 U.S. 261, 272 (1964); *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-422 (1966).

financial health of multiemployer plans, we believe that the question whether trustees may enforce NLRA-based contribution obligations in federal court deserves the immediate attention of this Court.

### CONCLUSION

The petition for a writ of certiorari should be granted.  
Respectfully submitted.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,  
v. *Petitioners*,

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent.*

**Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

**MOTION OF THE  
NATIONAL COORDINATING COMMITTEE  
FOR MULTIEMPLOYER PLANS FOR LEAVE  
TO FILE A BRIEF AND BRIEF AS *AMICUS CURIAE***

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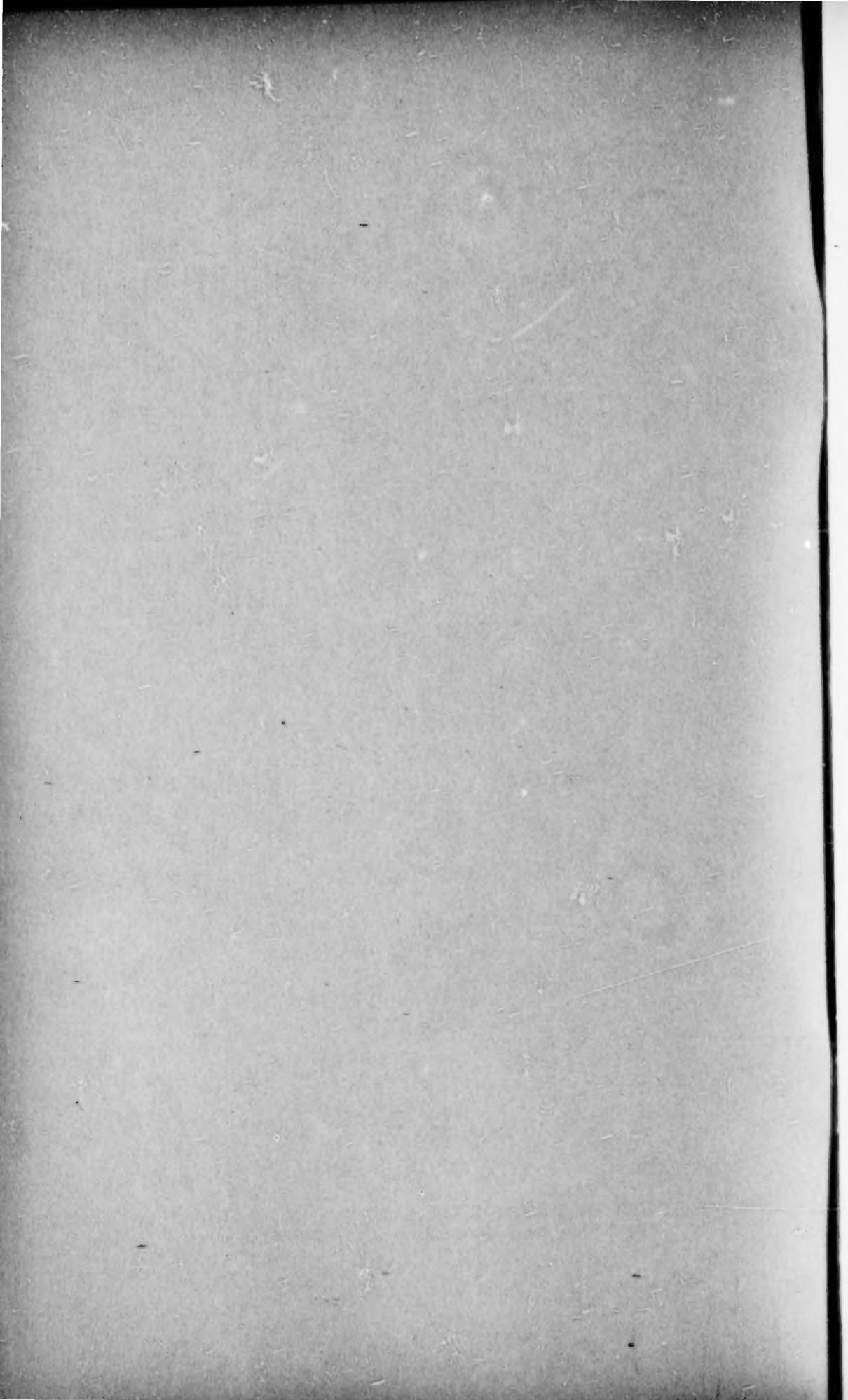
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IN THE  
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**MOTION OF THE  
NATIONAL COORDINATING COMMITTEE  
FOR MULTIEMPLOYER PLANS FOR LEAVE  
TO FILE A BRIEF AS *AMICUS CURIAE***

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To the Honorable Chief Justice and Associate Justices  
of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the  
National Coordinating Committee for Multiemployer  
Plans ("NCCMP") respectfully moves for leave to file  
the accompanying brief as *amicus curiae* in support of  
the petition for Writ of Certiorari. Petitioners have con-  
sented to the filing of this brief; respondents have not.

**INTEREST OF THE NCCMP**

The NCCMP is a nonprofit, tax-exempt organization  
formed after the enactment of the Employee Retirement

Income Security Act of 1974 ("ERISA")\* to represent the interests of multiemployer plans and their participants in the regulation of benefit plans under ERISA and other laws. More than 150 multiemployer plans (including the petitioners) and related international unions are members of the NCCMP. These plans are fairly representative of all the nation's multiemployer plans, covering more than nine million workers and their families.

Because of the broad range of experience of the NCCMP's constituent organizations and its close, ongoing contacts with the hundreds of trustees charged with operating multiemployer plans, the NCCMP believes that it is uniquely qualified to provide the Court with insight concerning the practical, negative implications of the decision below for multiemployer plans and to state the position of trustees, participants, and beneficiaries of such plans. In fact, the NCCMP has recently participated as an *amicus curiae* in both *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport Inc.*, 472 U.S. \_\_\_, 86 L.Ed.2d 447 (1985) and *Connolly v. PBGC*, 475 U.S. \_\_\_, 89 L.Ed.2d 166 (1986).

The NCCMP urges this Court to issue a Writ of Certiorari. Refusal of this Court to review the judgment below will have broad, adverse consequences upon the financial soundness of the NCCMP's member employee benefit plans and, therefore, upon the plans' ability to provide benefits.

#### **ISSUES DEVELOPED BY THE NCCMP**

The NCCMP brief focuses on issues which it believes may not be adequately presented elsewhere, including:

- (a) the particularly adverse impact that the court's holding below will have on national employee

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\* ERISA was substantially amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), P.L. 96-364, 94 Stat. 1208 (1980).

benefit policies generally, and on multiemployer plans in particular; and

- (b) the fundamental conflict in principle between the decision of the court below and decisions of this Court, as well as a conflict in principle between the decision of the court below and decisions in the other federal circuits.

The NCCMP, therefore, moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

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No. 85-2079

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**LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,**  
*Petitioners,*  
v.

**ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,**  
*Respondent.*

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**Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF OF THE  
NATIONAL COORDINATING COMMITTEE  
FOR MULTIEmployer PLANS AS *AMICUS CURIAE*  
IN SUPPORT OF PETITIONERS**

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The National Coordinating Committee for Multiemployer Plans (“NCCMP”) submits this brief as *amicus curiae* to urge the Court to review the holding below that multiemployer plan trustees cannot invoke federal jurisdiction under ERISA to exercise their fiduciary responsibility for collecting delinquent contributions for the period subsequent to the expiration date set forth in a collective bargaining agreement, but prior to the bargaining parties reaching impasse or a new agreement. Instead, the court below held that trustees must seek to invoke the jurisdiction of the National Labor Relations Board (the “NLRB”) to secure contributions due and owing during that interim period.

## I. INTEREST OF THE NATIONAL COORDINATING COMMITTEE FOR MULTIELPLOYER PLANS

The nature and purpose of the NCCMP is set forth in the accompanying motion for leave to file this brief. As set forth herein, the NCCMP submits that the decision below offends national employee benefit policies established by Congress and recognized by this Court and, therefore, will have a significant adverse effect upon the nation's multiemployer plans and the benefit security of more than nine million participants and their families.

The impact of the decision below is to force multiemployer plans to provide benefits for hours worked, while denying the self-same plans a judicial forum and, in some circumstances, any forum in which to collect the contributions that should have been paid for those hours worked. That result is totally at odds with the purposes of ERISA. *See, e.g.,* 29 U.S.C. §§ 1001(b), 1001A.

A financially sound pension plan, and one operating within the confines of law, requires a proper actuarial relationship between employer contributions and employee benefits. The necessary predicate to maintaining the legally mandated financial integrity of multiemployer pension plans is the implementation of an ongoing system to collect employee contributions. The inability to collect these contributions can lead to inadequate funding of the multiemployer plans involved.

After the expiration date of a collective bargaining agreement, employees commonly continue to work during the period of negotiations for a new agreement. Such negotiations may continue for extended periods of time. The decision below undercuts efforts to ensure proper funding of employee benefit plans, by encouraging employers to refuse to contribute during the post-expiration period when negotiations are ongoing. This incentive not to contribute, resulting from the decision below, is bolstered by employers' awareness not only that the NLRB may compromise the amount owed to the plan, but also

that the NLRB may require an employer to pay something less than the Congressionally mandated remedy for collection actions brought in federal court, *i.e.*, contributions, interest, liquidated damages, costs, and reasonable attorney fees. 29 U.S.C. § 1132(g)(2). Thus, the decision below undermines the fiduciary authority of trustees and threatens the financial foundation of multiemployer plans.

By enacting ERISA, Congress sought to enhance the financial stability of multiemployer plans and to foster the maintenance and growth of such plans. The legislative history of both ERISA and MPPAA confirms the importance of ready and direct access to the federal courts to collect contributions. Ensuring full funding of pension plan benefits through timely payment of employer contributions is one of the statute's principal objectives. The decision below is contrary to these Congressional goals. It is to elaborate upon these concerns and to place them before the Court that the NCCMP has sought permission to file this brief.

## II. SUMMARY OF REASONS FOR REVIEW

A. Consistent with established Congressional policy recognizing the importance of employee benefits to the financial well-being of millions of Americans, 29 U.S.C. §§ 1001, 1001A, this Court has declared that employee benefit plan trustees have an absolute duty of loyalty to plan beneficiaries and the exclusive authority to control plan administration. *See Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. —, 86 L.Ed.2d 447 (1985); *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). To fulfill these responsibilities, this Court has consistently recognized the right and duty of multiemployer plan trustees to calculate and collect employer contributions due and owing to employee benefit funds. *See Central Transport; Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983); *Amax Coal Co.; Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960).

The independent right of trustees to collect employer contributions is a fundamental prerequisite to the discharge of all fiduciary duties. *Accord, Central Transport; Jim McNeff, Inc. v. Todd*; 2 Scott on Trusts §§ 170, 171 (3d ed. 1967). Moreover, ERISA expressly directs the federal courts to award not only the delinquent contributions, but also interest, liquidated damages, and the cost of collection, including reasonable attorney fees. 29 U.S.C. § 1132(g)(2). Congress stated its intent that the purpose of this mandatory judicial remedy is to discourage delinquencies and to foster the financial integrity of multiemployer plans. Yet, contrary to these fundamental principles and the express intent of Congress, the court below limited trustees' authority to collect delinquent contributions that are due after the expiration date of a collective bargaining agreement, but prior to impasse or the successful negotiation of a new bargaining agreement.<sup>1</sup> The decision below forces trustees to seek to invoke the jurisdiction of the NLRB, albeit that agency cannot provide the remedies mandated by Congress under ERISA. *Accord, Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940). Yet, Congress directed that plan trustees be given "ready access" to the federal courts, 29 U.S.C. § 1001(b).

The decision of the court below, which failed to recognize federal district court jurisdiction under ERISA sufficiently broad to enable plan trustees themselves to enforce employer funding obligations, threatens the financial integrity of the multiemployer plans that trustees—

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<sup>1</sup> The Third and Fifth Circuits and another panel of the Ninth Circuit have all recently reached the same result in similar cases. *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986); *Office and Professional Employees Insurance Trust Fund v. Laborers Fund Administrative Office*, 783 F.2d 919 (9th Cir. 1986). The Fifth and Ninth Circuits cited the decision below.

not the NLRB—are obligated to protect. *See, e.g.*, 29 U.S.C. § 1104.

The significance of this issue in the administration of ERISA and the serious hindrance to the effective maintenance and continuation of multiemployer plans warrants review by this Court. *Accord, Rothensies v. Electric Battery Co.*, 329 U.S. 296 (1947); *United States v. Ruzicka*, 329 U.S. 287 (1946).

B. The Congress has chosen to exclude government agencies from the contribution collection process of multiemployer plans. *See* 29 U.S.C. § 1132(b)(2). That point has been underscored by this Court and the Department of Labor, which, as a practical matter, simply does not have “the resources for policing the day-to-day operations of each multiemployer plan in the Nation.” *Central Transport, Inc.*, 86 L.Ed.2d at 462. Nonetheless, the court below has forced trustees to resort to the NLRB administrative mechanism in order to exercise their essential fiduciary right to collect delinquent contributions, even though the NLRB may fashion a remedy that compromises the interests of the employee benefit plan. *See, e.g.*, *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix*, 605 F.Supp. 1441, 1444 (W.D. Mo. 1985); 29 C.F.R. § 101.9(c). However, the NLRB may decline to exercise jurisdiction for various reasons, and its decision to do so is essentially precluded from review. *See, e.g.*, *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975). Moreover, courts in at least two circuits have asserted that neither employee benefit funds nor their trustees have standing to invoke the jurisdiction of the NLRB. *Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1183 (11th Cir. 1985); *Botsford Ready Mix*, 605 F.Supp. at 1447. Applying the ruling below to decisions in these circuits totally precludes the collection of delinquent contributions for the period prior to impasse. Thus, on the one hand, plan trustees would be left without any forum in which

to collect contributions due and owing, but on the other, they would be saddled with the obligation to provide the benefits for which the contributions should have been made. *See Central Transport*, 86 L.Ed.2d at 455 n.7 and 463 n.20.

Absent a uniform rule enunciated by this Court, trustees will be whipsawed between the denigration of their authority by the court below and the ultimate responsibilities imposed on them by the judiciary, *see Central Transport*; by the executive, *see Internal Revenue Service G.C.M. 39048*, and Department of Labor Advisory Op. No. 76-89 (Aug. 31, 1976); and by the Congress, *see 29 U.S.C. §§ 1001(b), 1001A, 1053, 1054*.

### **III. REASONS FOR REVIEW**

#### **A. Multiemployer plan trustees must have an independent, federal cause of action to collect delinquent contributions for the entire period that employers have an obligation to make such contributions.**

The purpose of multiemployer benefit trusts and the policy underlying the statute which regulates those trusts are one and the same: to protect the interests of participants and to ensure the receipt of promised benefits. *See 29 U.S.C. §§ 186(c)(5), 1001(b)*. The property of multiemployer benefit trusts consists initially of employer contributions, which participating employers have a statutory obligation to pay and fund trustees have a duty to try to collect. *See 26 U.S.C. § 412 and 29 U.S.C. §§ 1082, 1104, 1106, 1132(g)(2), 1145*. Moreover, ERISA "vests the 'exclusive authority and discretion to manage and control the assets of the plan' in the trustees alone . . . 29 U.S.C. § 1103(a)." *Amax Coal*, 453 U.S. at 333.

One of Congress' principal purposes in adopting amendments to ERISA in 1980 was "to strengthen the fundamental requirements and enhance the financial stability

of multiemployer pension plans," *Amax Coal*, 453 U.S. at 338 n.22., by, *inter alia*, assuring that fund trustees will have the ability to recover delinquent contributions quickly and effectively. *Accord*, 29 U.S.C. §§ 1132(g)(2), 1145. Moreover, as the Court acknowledged in *Central Transport*, 86 L.Ed. 2d at 460, trustees have no real choice in this matter. Any failure on the part of fund trustees to pursue diligently their obligation to collect contributions can constitute a breach of their statutory fiduciary obligation, as well as an unlawful extension of credit to a delinquent employer. *Id.*

Furthermore, the fact that an employer has wrongfully failed to make contributions on behalf of an employee has been held not to form the basis for trustees' refusal to pay the employee a benefit. Thus, the entitlement and amount of a pension benefit are a function of hours of service, not hours of service for which contributions were paid. *See Van Gunten v. Central States, Etc.*, 672 F.2d 586 (6th Cir. 1982); *Central States Southeast Pension Fund v. Hitchings Trucking, Inc.*, 472 F.Supp. 1243, 1247 (E.D. Mich. 1979). Moreover, in the view of the Internal Revenue Service,

a multiemployer plan must credit an employee's years of service even though the employer failed to make the required contributions . . . [b]ecause . . . the employee should not bear the risk of employer non-contribution.

*Internal Revenue Service G.C.M. 39048*, reprinted in PENS. REP. (BNA), No. 471 at 1764-65 (Nov. 21, 1983).

In order "to make as certain as possible that pension fund assets would be adequate" to pay benefits due, Congress "prescribed standards of conduct" for plan fiduciaries. *Nachman Corporation v. PBGC*, 446 U.S. 359, 375 (1980). *See* 29 U.S.C. § 1104. Therefore, the trustees, upon whom Congress has imposed a nondelegable fiduciary

duty to maintain the financial integrity of the trust, must have a meaningful mechanism to seek to collect the amounts that employers are obligated to contribute. *Rosen v. Hotel and Restaurant Employees, Etc.*, 637 F.2d 592 (3d Cir. 1981).

In this regard, "neither the structure of ERISA nor the legislative history show any Congressional intent that trustees should rely primarily on centralized federal monitoring of employer contribution requirements."<sup>2</sup> *Central Transport*, 86 L.Ed. 2d at 463. Indeed, Congress expressly withheld from the Secretary of Labor the authority to initiate actions to enforce an employer's contribution obligations. See 29 U.S.C. §§ 1132(b)(2), 1145. In contrast, "trustees were given the authority to sue to enforce an employer's obligations to a plan." *Central Transport*, 86 L.Ed 2d at 463. "The Court of Appeals' argument obviously conflicts with one of the principal Congressional concerns motivating the passage of the Act, that plans should assure *themselves* of adequate funding by promptly collecting employer contributions." *Id.* at 464. (citations omitted) (emphasis added).

Multiemployer plan trustees must seek to collect contributions from employers, so long as the employers continue to have an obligation to contribute. 29 U.S.C. §§ 1104, 1106, 1145. A trustee determination that an employer has an obligation to contribute to the plan is critical to the administration of the plan. As with all matters of plan administration, the federal judiciary defers to the decision of the trustees, unless the decision is found to be arbitrary and capricious. See, e.g., *Pokratz*

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<sup>2</sup> For example, S.3017 (entitled the "ERISA Improvements Act of 1978") provided, *inter alia*, for the establishment of an independent federal agency—the Employee Benefits Commission—to administer and enforce Titles I and IV of ERISA. Although S.3017 included a provision identical to 29 U.S.C. § 1145, obligating employers to contribute, the bill expressly precluded the proposed Commission from bringing collection actions to enforce the provision.

*v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir. 1985). *Accord, UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

A trustee determination that an employer continues to be obligated to contribute means that participant service with the employer is credited for purposes of pension benefit accrual and vesting. 29 U.S.C. §§ 1053, 1054. To the extent employer contributions are not recovered on behalf of the plan, the ability of the plan to provide benefits generally is diminished. Moreover, to the extent such contributions are not recovered, a plan's underfunding increases.

The 1980 amendments to ERISA were prompted by Congressional anxiety about the financial stability of multiemployer plans and concern that the maintenance and growth of such plans was being discouraged. See 29 U.S.C. § 1001A. See generally Report of the House of Representatives Committee on Education and Labor on H.R. 3904, H.Rep. No. 96-869 (Part I), 96th Cong., 2d Sess. (April 3, 1980). Certainly, "the purpose of Congress is the ultimate touchstone," *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978), quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1962), and the drafters of the 1980 amendments did explain the problem they sought to remedy by the enactment of section 515 of ERISA, 29 U.S.C. § 1145:

Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees

and other legal costs arise in connection with collection efforts.

These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contributions rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.

*Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly.* Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their pension promises.

Senate Labor Committee Summary and Analysis of Consideration of S.1076 (April 1980) (emphasis added). See 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams).

Given the clear intent of Congress to foster the financial integrity of multiemployer plans and to provide "ready access" to the federal judiciary, the language of ERISA § 515—which expressly provides the basis for direct federal court jurisdiction of trustee suits to collect contributions where the employer is obligated to contribute "under the terms of the plan or under the terms of a collectively bargained agreement"—is broad enough to include an employer's obligation to contribute in accordance with the terms of the plan or agreement that

has been extended by operation of labor-management relations law.<sup>3</sup>

**B. The NLRB does not provide trustees with a forum to satisfy their fiduciary duty of maintaining the financial stability of multiemployer plans.**

The court below predicated its decision, that the federal judicial forum should be displaced by the NLRB for collection actions like the instant case, on the premise that plan trustees can invoke the jurisdiction of the NLRB. 779 F.2d at 503. Yet, in *Board of Trustees v. Universal Enterprises*, 751 F.2d 1177, 1183 (11th Cir. 1985), the Eleventh Circuit concluded that multiemployer plan trustees had no standing to invoke the jurisdiction of the NLRB. Moreover, in *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix*, 605 F.Supp. 1441, 1447 (W.D. Mo. 1985), a district court within the Eighth Circuit asserted that multiemployer plan trustees "are powerless to initiate" an action before the NLRB. Therefore, although "[p]ension plan trustees must have a forum in which to enforce trust obligations," *Laborers Health & Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416 (9th Cir. 1983), there is a conflict among the circuits as to whether multiemployer plan trustees can even gain access to the NLRB.<sup>4</sup>

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<sup>3</sup> The court below arrived at a contrary conclusion through a strict construction of a remedial statute. But see, e.g., *Leigh v. Engle*, 727 F.2d 113, 139 (7th Cir. 1984) (ERISA must be construed broadly); 2A *Sutherland Stat. Const.* § 46.07 at 110 (4th ed.).

<sup>4</sup> Multiemployer plans often extend coverage over wide geographical areas. The duties and obligations of the trustees of these plans must, therefore, be uniform throughout the circuits. *Accord, Roberts v. Burlington Industries, Inc.*, 54 U.S.L.W. 3836 (U.S. June 24, 1986), affirming, *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985); 29 U.S.C. § 1144. This need for consistency is also reflected in the express Congressional directive that the United States courts fashion a federal common law of pensions to fill the statutory interstices extant in ERISA. See, e.g., *Smith v. CMTA-IAM Pension Trust*, 654 F.2d 650, 663 (9th Cir. 1981).

Assuming *arguendo* that trustees have standing to invoke the jurisdiction of the NLRB, the NLRB may of its own volition decline to exercise that jurisdiction. See, e.g., *NLRB v. Marsden*, 701 F.2d 238, 241 (2d Cir. 1983); 29 U.S.C. § 164(c) (1). The general counsel's discretionary decisions regarding the investigation of charges, and the issuance and prosecution of complaints is precluded from review under LMRA § 3(d), 29 U.S.C. § 153(d). See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975); *Saez v. Goslee*, 463 F.2d 214, 215 (1st Cir.), cert. denied, 409 U.S. 1024 (1972). As the Ninth Circuit itself admits,

We confess that it is difficult to imagine a situation where the refusal of the general counsel to issue a complaint would violate an express statutory command of the [Labor] Act as it now exists, because nothing in it requires the general counsel to issue complaints upon the finding of a violation. As we have already pointed out, his statutory authority is permissive. 29 U.S.C. §§ 153(d), 160(b).

*Baker v. International Alliance of Theatrical Stage Employees*, 691 F.2d 1291, 1296-97 (9th Cir. 1982). Thus, forcing trustees to resort to the NLRB is clearly at odds with the Congressional intent to facilitate collection actions in the federal courts. See 29 U.S.C. § 1001(b).

Moreover, a proceeding before the NLRB "is not to adjudicate private rights but to effectuate a public policy" of promoting labor peace. *NLRB v. Shipbuilding Local 22*, 391 U.S. 418, 424 (1968). See *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940). Preserving the financial integrity of multiemployer plans was not even an afterthought in the Congressional design of the statute regulating the collective bargaining process. "The atmosphere in which employee benefit trust fund fiduciaries must operate, as mandated by § 302(c)(5) and ERISA, is wholly inconsistent with this process of compromise and economic pressure." *Amax Coal*, 453 U.S. at 336.

The Congressional intent to give trustees real clout in collection actions by providing for mandatory awards of contributions, plus interest, liquidated damages, costs, and reasonable attorney fees, 29 U.S.C. § 1132(g)(2), is inconsistent with requiring trustees to proceed before the NLRB, where the grant of relief, if any, resides in the sole discretion of the Board.<sup>5</sup> Thus, for example, in *Botsford Ready Mix*, 605 F.Supp. at 1443, the court acknowledged that the NLRB's general counsel settled a union unfair labor practice charge by requiring the employers to pay only 80 percent of the contributions, which the employers owed to the multiemployer benefit plan. See, e.g., *NLRB v. Laborers International Union of North America, AFL-CIO, Local 282*, 567 F.2d 833 (8th Cir. 1977); 29 C.F.R. § 101.9 (permitting the general counsel to settle under terms opposed by the charging party); 29 C.F.R. § 101.4 (case may be disposed of through informal methods of withdrawal, dismissal, and settlement).

This less than adequate remedial power of the NLRB is a broad discretionary one, subject only to limited review. See *Fibreboard Corporation v. NLRB*, 379 U.S. 203, 216 (1964); *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953). Consequently, under the decision below, multiemployer pension plan trustees, who must provide full benefits for hours worked, would be at the mercy of the NLRB and its general counsel, who—unlike the trustees—may not be bound by any of ERISA's fiduciary duties in deciding whether and to what extent to exercise the jurisdiction of the Board.

Contrary to “the structure of ERISA [which] makes clear that Congress did not intend for government en-

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<sup>5</sup> “The regulatory scheme established for labor relations by Congress is ‘essentially remedial,’ and the [NLRB] is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940).” *Wisconsin Department of Industry v. Gould, Inc.*, 475 U.S. —, 89 L.Ed. 2d 223, 229 n.5 (1986).

forcement powers to lessen the responsibilities of plan fiduciaries," *Central Transport*, 86 L.Ed.2d at 462, the decision below diminishes trustees' fiduciary authority and undermines the financial stability of multiemployer plans.

### CONCLUSION

For the foregoing reasons, the NCCMP respectfully urges this Court to issue a Writ of Certiorari.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

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LABORERS HEALTH AND WELFARE TRUST  
FUND FOR NORTHERN CALIFORNIA, *et al.*,  
v. *Petitioners*,

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent.*

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On Petition for Writ of Certiorari to the  
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for the Ninth Circuit

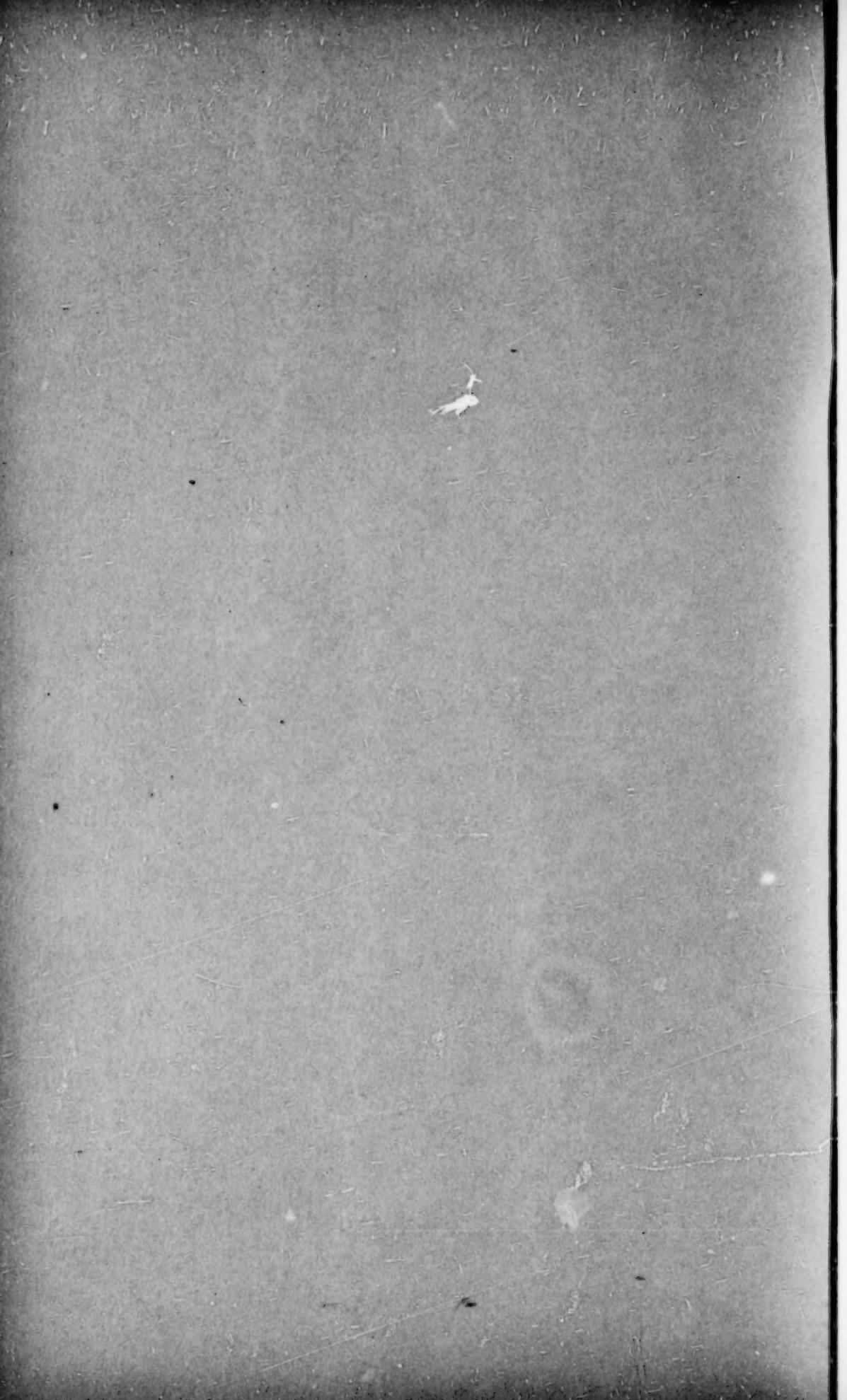
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**MOTION OF THE LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA NATIONAL (INDUSTRIAL)  
PENSION FUND FOR LEAVE TO FILE A BRIEF  
AND BRIEF AS AMICUS CURIAE**

---

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IN THE  
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**MOTION OF THE LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA NATIONAL (INDUSTRIAL)  
PENSION FUND FOR LEAVE TO FILE A BRIEF  
AS AMICUS CURIAE**

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To the Honorable Chief Justice and Associate Justices  
of the Supreme Court of the United States:

Pursuant to Rule 36 of the Rules of this Court, the  
Laborers International Union of North America National  
(Industrial) Pension Fund (the "Pension Fund") re-  
spectfully moves for leave to file the accompanying brief

as *amicus curiae* in support of the petition for Writ of Certiorari. Petitioners have consented to the filing of this brief; Respondents have not.

### **INTEREST OF THE PENSION FUND**

The Pension Fund is a labor-management trust fund established pursuant to section 302(c)(5) of the Labor-Management Relations ("Taft-Hartley") Act [29 U.S.C. § 186(c)(5)] and administered by a board of union and employer appointed trustees to provide pension benefits to workers represented for purposes of collective bargaining by affiliates of the Laborers International Union of North America ("LIUNA"). It is also a multiemployer pension plan within the meaning of and covered by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended.

More than twenty thousand workers are covered by the Pension Fund. And currently more than five hundred employers scattered over nearly all fifty States (including States within the Ninth Circuit) contribute to the Pension Fund pursuant to collective bargaining agreements with LIUNA local unions and district councils. Employer contributions are based on a bargained amount for each hour, day or week worked by a covered laborer.

The Pension Fund is typical of national and regional multiemployer pension plans. And as with other such plans, the prompt collection of employer contributions is an essential function of the Pension Fund. Those contributions provide the funding necessary to pay monthly pension benefits to retirees.

The Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA") [P.L. 96-364, 94 Stat. 1208 (1980)] amendments to ERISA greatly enhanced the effectiveness of the Pension Fund's contribution collection program. The provision in ERISA section 502(g)(2) [29 U.S.C. § 1132(g)(2)] of mandatory interest, liquidated damages

and attorneys' fees remedies has discouraged employees from becoming delinquent. Where employers fail in their obligation to contribute, ERISA section 515 [29 U.S.C. § 1145], added by MPPAA, provides an effective and generally efficient mechanism for judicial enforcement. This is all in accordance with the Congressional design of fostering the flow of employer contributions into multiemployer plans, thereby improving the plans' funding base and securing the pension benefits of plan participants.

The decision by the Court of Appeals in this case, unless overturned by this Court, will impede the ability of the Pension Fund, and all other multiemployer plans, to promptly and fully collect vital employer contributions. In view of the number of individual collective bargaining relationships on which the Pension Fund depends for contributions, the Pension Fund is frequently confronted with having to collect contributions during the sometimes long periods between collective bargaining agreements. Commonly, an employer is delinquent for a period during the term of a collective bargaining agreement as well as for the period while bargaining on a new agreement is progressing. By restricting the Pension Fund's enforcement recourse to filing an unfair labor practice charge with the National Labor Relations Board, the decision below would deprive the Pension Fund of (1) the delinquency disincentives of the ERISA section 502(g)(2) remedies, (2) control over the essential, fiduciary function of contribution collection, and (3) an efficient, prompt and effective means of maintaining contribution flow. As a result, the funding of the Pension Fund and the retirement income of the workers it covers would be less secure.

In short, this case presents an issue of federal law that is of compelling importance to the Pension Fund and all other multiemployer plans, and that raises national policy concerns that can only be resolved by this Court.

## **ISSUES DEVELOPED BY THE PENSION FUND**

The Pension Fund's brief focuses on issues which it believes may not be adequately addressed elsewhere, including:

- (a) resolution of the case requires interpretation and accommodation of national employee benefits policy and national labor policy which only this Court can authoritatively provide; and
- (b) ERISA plainly vests exclusive jurisdiction in the courts to make impasse determinations in an employer withdrawal liability context, and there is no rational basis for precluding courts from making such determinations in suits to collect employer contributions.

The Pension Fund, therefore, moves for leave to file the accompanying brief *amicus curiae*.

Respectfully submitted,

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Dated: July 17, 1986

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IN THE  
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On Petition for Writ of Certiorari to the  
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BRIEF OF THE LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA NATIONAL (INDUSTRIAL)  
PENSION FUND AS AMICUS CURIAE  
IN SUPPORT OF PETITIONERS

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The Laborers International Union of North America National (Industrial) Pension Fund (the "Pension Fund") submits this brief as *amicus curiae* to urge the Court to review the holding of the Court of Appeals that the federal courts lack jurisdiction over suits brought by multiemployer plan trustees pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, to collect employer contributions due for the period between the expiration of a collective bargaining agreement and impasse in bargaining for a new agree-

ment. We submit that the appeals court's conclusion—that plan trustees' only recourse for collecting such contributions is to file unfair labor practice charges with the National Labor Relations Board ("NLRB")—is erroneous, and that national employee benefits policy demands reversal of the decision by this Court.

### INTEREST OF THE PENSION FUND

As described in the motion for leave to file this brief, the Pension Fund and its Board of Trustees have a keen interest in the issue presented by this case. This Court has already recognized and discussed the vital role of employer contributions in the financing of multiemployer pension as well as health and welfare plans. Unless reversed, the decision below will greatly impede the ability of the Pension Fund, and all other multiemployer plans, to promptly and fully collect employer contributions and thereby jeopardize the financial standing of the Pension Fund and the retirement income security of the laborers covered by the Pension Fund. The Pension Fund will be denied access to the efficacious federal court forum which Congress intended for collection of contribution delinquencies. The fiduciary function of collecting contributions will be taken from the Board of Trustees and placed in the hands of NLRB personnel who are not responsible to the Pension Fund's trustees or participants. And the Pension Fund will be deprived of the ERISA remedies which Congress created to discourage employers from becoming delinquent in their contribution obligations.

The petition submitted by the Petitioners contains an extensive discussion of several persuasive compelling reasons for this Court to grant review. We also understand that the National Coordinating Committee for Multi-employer Plans ("NCCMP") is filing a motion and brief as an *amicus curiae*. The Pension Fund agrees with the positions stated in the petition and the NCCMP's brief, and accordingly has attempted to avoid burdening the Court with repetition. However, the Pension Fund urges

the Court to consider the additional points and authorities contained herein.

### **REASONS FOR GRANTING REVIEW**

#### **I. RESOLUTION OF THE CASE REQUIRES INTERPRETATION AND ACCOMMODATION OF NATIONAL LABOR POLICY WHICH ONLY THIS COURT CAN AUTHORITATIVELY PROVIDE.**

As the Court has repeatedly observed, ERISA was enacted in 1974 primarily to ensure that workers and their beneficiaries received their anticipated pension benefits upon retirement, and that they not be deprived of those benefits because of, among other reasons, insufficient funds in their pension plans. *See Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport*, *et al.*, 472 U.S. —, 86 L. Ed. 2d 447, 457 (1985); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984). In 1980, ERISA was substantially amended with respect to multiemployer plans by the Multiemployer Pension Plan Amendments Act ("MPPAA"), P. L. 96-364, 94 Stat. 1208. MPPAA was a response to Congress' finding, after lengthy study, that multiemployer pension plans were vulnerable to financial instability. *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86-87 (opinion of the Court), 91-99 (Brennan, J., dissenting) (1982); *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, *supra*; *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. —, 89 L. Ed. 2d 166 (1986). *See also NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981). And, as this Court has recognized, Congress has identified the failure of some employers to make full and timely contributions as a key factor undermining the financial soundness of plans. *See Kaiser Steel, supra*; *Central Transport*, 86 L. Ed. 2d at 464 n.22.

Congress found further that the legal recourse then available to plan trustees for the enforcement of contribution obligations was inadequate, and deliberately acted to correct this deficiency and provide a simple, efficient and effective means for plan trustees to collect delinquent contributions. *See Kaiser Steel*, 455 U.S. at 87, 91-96 (quoting pertinent MPPAA legislative history). It declared that “[t]he public policy of [MPPAA] to foster the preservation of the private multiemployer plan system mandates that provision be made to discourage delinquencies and simplify delinquency collection.” *Id.* at 94 n.3, quoting, Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess. 44 (Comm. Print 1980). And to implement this policy, MPPAA added to ERISA section 515 [29 U.S.C. § 1145], which provides trustees with a statutory cause of action to collect delinquent contributions, and section 502(g)(2) [29 U.S.C. § 1132(g)(2)], which mandates courts to award interest, liquidated damages, and attorneys’ fees to plan trustees who prevail in a section 515 suit. *Id.* Importantly, Congress vested the federal courts with exclusive jurisdiction over contribution collection actions. *See* ERISA § 502(a)(3), (e) [29 U.S.C. § 1132(a)(3), (e)]. *See also Kaiser Steel*, 455 U.S. at 93-96.

This policy reflected in the MPPAA amendments complements another aspect of the national employee benefits policy expressed through the minimum standards of fiduciary conduct set forth in ERISA §§ 401-409 [29 U.S.C. §§ 1101-1109]. Reading into these ERISA standards common law trust principles, this Court recently held that multiemployer plan trustees bear a strict fiduciary duty to identify workers on whose behalf contributions are owed and to make reasonable efforts to collect delinquent employer contributions. *See Central Transport*, 86 L. Ed. 2d at 475-61. The Court further ruled that this fiduciary duty is not delegatable to a union, whose collective bargaining agreement requires the contributions, or to a governmental body. *Id.* at 461-63.

The court of appeals in this case, like two other federal appeals courts which have since addressed the issue,<sup>1</sup> subordinated these ERISA-based national employee benefits concerns to its understanding of the current law of NLRB preemption. At the core of the court's holding is a belief that the fiduciary lacks jurisdiction to make determinations as to whether a bargaining impasse has been reached so as to terminate the employer's post-contract contribution obligations.

However, preemption is not a mechanical formula; nor does it involve a rigid application of clear Congressional intent. Rather, whether a court is preempted from ruling on a matter normally within the province of the NLRB often rests upon a judicial evaluation of the national labor policy interests as compared with competing policies. And on several occasions this Court has weighed the competing interests more heavily and sanctioned judicial resolution of unfair labor practice issues and other matters over which the NLRB normally exercises exclusive jurisdiction. See, e.g., *Kaiser Steel*, 455 U.S. at 83-85; *Connell Construction Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1975). Cf. *Carpenters Local 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 517-19 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983) (court can decide the appropriateness of a bargaining unit in the context of a Taft-Hartley Act section 301 suit to enforce a collective bargaining agreement, particularly in view of the related ERISA contribution collection claims).

In a case like this, involving a balance between national employee benefits policy and national labor policy, review by this Court is particularly appropriate. This is because Congress in enacting ERISA charged the judiciary with the obligation and the power to formulate a substantive federal common law of employee benefits to implement

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<sup>1</sup> *Moldovan v. Great Atlantic & Pacific Tea Co., Inc.*, 790 F.2d 894 (3d Cir. 1986); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986).

and supplement the express statutory terms in a fashion akin to the way the courts have carried out the mandate of *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), with respect to section 301 of the Taft-Hartley Act. [29 U.S.C. § 185] See, e.g., *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for So. California*, 463 U.S. 1, 24 n.26, 26 (1983); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. \_\_\_, 87 L. Ed. 2d 96, 112-13 (Brennan, J., concurring in judgment) (1985); *Menhorn v. Firestone Tire & Rubber Co.*, 738 F.2d 1496, 1498-1500 (9th Cir. 1984). The Court, we submit, has a special obligation under the ERISA regulatory scheme to review the policy balance struck by the Ninth Circuit.

**II. ERISA PLAINLY VESTS EXCLUSIVE JURISDICTION IN THE COURTS TO MAKE IMPASSE DETERMINATIONS IN AN EMPLOYER WITHDRAWAL LIABILITY CONTEXT, AND THERE IS NO RATIONAL BASIS FOR PRECLUDING COURTS FROM MAKING SUCH DETERMINATIONS IN SUITS TO COLLECT EMPLOYER CONTRIBUTIONS.**

In concluding that only the NLRB can make bargaining impasse determinations, the court of appeals failed to consider that ERISA, as amended by MPPAA, on its face vests exclusive jurisdiction in the courts to make precisely the same impasse determinations in the context of suits to collect employer withdrawal liability. Yet, subsequently a different panel of the same appeals court ruled that the courts (not the NLRB) are required to make bargaining impasse determinations in suits by multiemployer plans to recover withdrawal liability from employers, and it remanded the case to the lower court for such a determination. See *Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1986).

As discussed by this Court in the *R.A. Gray* and *Connolly* cases, MPPAA introduced a statutory liability for

employers which withdraw from multiemployer pension plans under certain conditions. This potential liability was another aspect of the legislation's overall design to enhance the financial stability of multiemployer pension plans.

Whether an employer has incurred a "complete withdrawal" from a plan so as possibly to be subject to liability depends in part on whether the employer has permanently ceased "to have an obligation to contribute under the plan." ERISA § 4203(a) [29 U.S.C. § 1383 (a)]. The term "obligation to contribute" is defined by ERISA § 4212(a) [29 U.S.C. § 1392(a)] to include "an obligation to contribute arising . . . as a result of a duty under applicable labor-management relations law. . . ." This encompasses the employer's obligation under the National Labor Relations Act to continue contributing to multiemployer plans after its collective bargaining agreement has expired until such time as it bargains to impasse with the union (or reaches a new agreement). *Woodward Sand*, 789 F.2d at 695.

Under ERISA § 4301(a),(c) [29 U.S.C. § 1451(a), (c)] exclusive jurisdiction is vested in the federal and state courts over suits by plan trustees to collect employer withdrawal liability. *See generally R.A. Gray & Co.*, 467 U.S. at 717. And such suits, as we have shown, necessarily involve the courts in determining whether the employer continues to have an obligation to contribute; that is, whether the employer's collective bargaining agreement has expired and he has bargained to impasse.

The *Advanced Lightweight* panel seriously erred in neglecting to consider this aspect of the MPPAA-ERISA legislative scheme. First, it establishes that Congress does not consider bargaining impasse determinations to be the exclusive province of the NLRB any longer (if it ever was<sup>2</sup>). Second, MPPAA and its legislative history clearly

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<sup>2</sup> See, e.g., *Producers Dairy Delivery v. Western Conference of Teamsters*, 654 F.2d 625 (9th Cir. 1981).

reflect a Congressional intent that claims by multiemployer withdrawal liability should be treated in the same manner as claims for delinquent employer contributions. *See ERISA § 4301(b)* [29 U.S.C. § 1451(b)]; 126 Cong. Rec. S11673-74 (daily ed., August 26, 1980) (remarks of Sen. Williams). *See also Trustees of Amalgamated Insurance Fund v. Geltman Industries, Inc.*, 784 F.2d 926, 931-32 (9th Cir. 1986). There is no rational basis for holding that courts may make impasse determinations in withdrawal liability collection suits but plans must resort to the NLRB when confronted by delinquent employer contributions.

### CONCLUSION

For these and the reasons stated in the petition and in the NCCMP *amicus* brief, the petition for a writ of certiorari should be granted.

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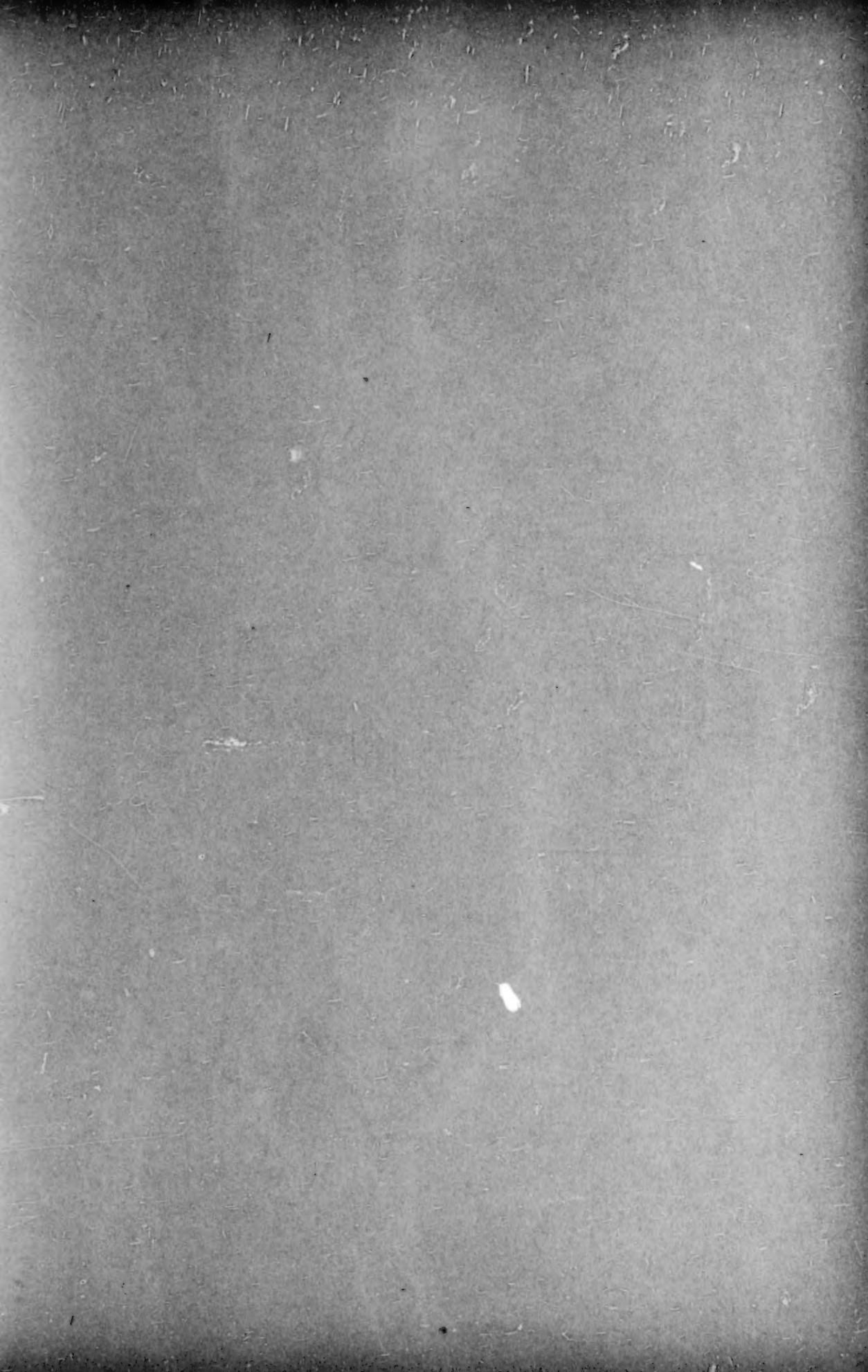
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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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MOTION OF THE CONSTRUCTION  
LABORERS' TRUST FUNDS FOR SOUTHERN  
CALIFORNIA FOR LEAVE TO FILE BRIEF  
AMICI CURIAE AND BRIEF AMICI CURIAE  
IN SUPPORT OF PETITIONERS

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No. 85-2079

IN THE  
SUPREME COURT  
OF THE UNITED STATES  
October Term, 1985

LABORERS HEALTH AND WELFARE TRUST  
FUND FOR NORTHERN CALIFORNIA, et al.,  
*Petitioners,*

vs.

ADVANCED LIGHTWEIGHT CONCRETE CO.,  
INC.,

*Respondent.*

---

MOTION OF THE CONSTRUCTION  
LABORERS' TRUST FUNDS FOR SOUTHERN  
CALIFORNIA FOR LEAVE TO FILE BRIEF  
AMICI CURIAE IN SUPPORT OF  
PETITIONERS

---

TO THE HONORABLE CHIEF JUSTICE AND  
ASSOCIATE JUSTICES OF THE SUPREME COURT  
OF THE UNITED STATES:

Pursuant to Supreme Court Rule 36(3), the Construction Laborers' Trust Funds for Southern California hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of counsel for the

petitioners and respondent was requested; counsel for petitioners consented but counsel for respondent refused.

### **INTEREST OF AMICI CURIAE**

The interest of the Trust Funds in this case arises by reason of cases pending before the United States District Court for the Central District of California, in which the issue at bar has been raised; namely, whether the District Court lacks jurisdiction to hear the claims of these Trust Funds to enforce the terms of a collective bargaining agreement and trust agreements with regard to fringe benefit contributions which become due after expiration of the collective bargaining agreement.

In the instant case, respondents, and the United States Court of Appeals for the Ninth Circuit, have taken the position that the District Court lacks jurisdiction to enforce the terms of the collective bargaining agreement and trust agreements after contract expiration. A ruling by this Court to that effect would be most damaging to Amici. The Trust Funds are concerned that the Court should be aware of the manifold ramifications of limiting jurisdiction of these matters to the National Labor Relations Board, especially with respect to the continued viability of multi-employer funds, as envisioned by Congress in expressly granting Federal Court jurisdiction when it enacted the Employee Retirement Income Security Act, 29 U.S.C. § 1000, et seq.

## CONCLUSION

For the above stated reasons, we respectfully urge the Court to grant the motion for leave to file the accompanying *amicus* brief in the present case in support of Petitioners.

Respectfully submitted,

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*Respondent.*

---

BRIEF OF AMICI CURIAE  
IN SUPPORT OF PETITIONERS

---

I

INTEREST OF THE AMICI CURIAE

*Amici Curiae*, Construction Laborers' Trust Funds for Southern California, are comprised of four employee benefit plans:

Construction Laborers' Pension Trust for Southern California;

Laborers' Health and Welfare Trust for Southern California;

**Construction Laborers' Vacation Trust for Southern California;**

**Laborers' Training and Re-Training Trust for Southern California.**

Each of these Trusts is a multi-employer employee benefit plan created pursuant to collective bargaining agreements between employers and unions; each was organized and is administered pursuant to the provisions of Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c)(5). Each Trust Fund receives contributions from employers on behalf of employees covered by the terms of the collective bargaining agreements.

Approximately 18,000 laborers are active participants in these *amici* Trust Funds. In addition, approximately 10,000 retired individuals are currently receiving pension benefits from *amicus* Construction Laborers' Pension Trust Fund for Southern California. Payments to these retirees find their source in the regular contributions made by employers. The health care benefits paid to active members are dependent upon eligibility sustained by continued contributions by their employers, even during contract negotiations.

Approximately 2,200 employers currently make contributions to these *amici* Trust Funds. The majority of the employers are signatory to collective bargaining agreements with triennial expiration dates. In 1983, 594 employers terminated their agreements with the Union; a large number of them negotiated new agreements. Within the past six months over 200 participating employers have sent termination notices to the union. Based on the previous reporting history of employers, and hours worked by their covered employees, these terminations represent a potential

loss of approximately \$500,000.00 per month in fringe benefit contributions that the *amici* Trust Funds will be unable to collect through Federal Court action if the lower Court's opinion is allowed to stand. Additionally, fringe benefit contributions claimed by the Trust Funds in pending litigation over the 1983 terminations will be virtually lost to the Trust Funds and their beneficiaries, inasmuch as the 6-month statute of limitations for filing charges with the National Labor Relations Board had long since passed when the Ninth Circuit cut off jurisdiction.

These *amici* Trust Funds, therefore, have a substantial interest in the subject matter of the within Petition.

## II

### ARGUMENT

#### A. SECTIONS 502 AND 515 OF ERISA PROVIDE FOR AN INDEPENDENT BASIS FOR FEDERAL COURT JURISDICTION

Sections 502 and 515 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. Sections 1132 and 1145, can be used as a basis for District Court jurisdiction to consider an employer's obligation to contribute fringe benefit contributions to multi-employer benefit plans pursuant to the terms of the Trust Plans after the expiration of its collective bargaining agreement.

Even though Section 515 of ERISA does not contain a separate, explicit definition of "obligation to contribute" as that found in Section 4212(a) of ERISA, 29 U.S.C. Section

1392(a).<sup>1</sup> Section 515 of ERISA does create a separate and distinct obligation to contribute. That obligation is stated in the disjunctive, that is, "under the terms of the plan or under the terms of the collective bargaining agreement."<sup>2</sup>

Congress has recognized that the obligation to contribute can arise under different circumstances. In this situation, it arises "under the terms of the plan" which continued or survived the expiration of the collective bargaining agreement.

To accept respondent's view that jurisdiction rests solely with the National Labor Relations Board would defeat ERISA's statutory goals and purposes merely because each chapter does not utilize exact uniformity of language. This is especially true where Section 515 of ERISA itself can be reasonably construed to implement Congressional intent.

Furthermore, Section 515 of ERISA actually provides for that uniformity of purpose by using the disjunctive form which recognizes the prior decisional authority relating to "survivability" of the plan terms.

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<sup>1</sup> Section 4212(a) provides: "(a) Definition. For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising —

(1) under one or more collective bargaining (or related) agreements, or

(2) as a result of a duty under applicable labor-management relations law, but

does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions."

<sup>2</sup> Section 515 provides: "Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement."

For example, in *Hinson v. NLRB*, 428 F.2d 133 (8th Cir. 1970), the Court recognized "survivability" when it was confronted with an employer's argument that it would be illegal, pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. Section 186(c)(5), to pay fringe benefit contributions into a trust fund after expiration of the collective bargaining agreement and prior to impasse. The Court held that the trust agreements themselves survive the expiration of the collective bargaining agreement for purposes of satisfying the requirement for Section 302(c)(5)(b) of LMRA for a "written agreement with the employer." The Court went on to hold that:

Since the status quo is quite obviously defined by reference to the substantive terms of the expired contract, it follows that, in a limited and special sense those pertinent contractual terms 'survive' the expiration date. See *NLRB v. Comills Corp.*, 373 F.2d 595, (4th Cir. 1967). In tandem with this 'survival,' the separate Trust Fund agreements have a continuing viability for petitioner as marking the framework under which benefit payments will be administered and disbursed . . .<sup>3</sup>

It is this reaffirmation of the concept of survivability, as expressed in Section 515 of ERISA in conjunction with Section 502 of ERISA, which gives rise to the legislative mandate requiring the District Courts to exercise

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<sup>3</sup> Accord, *Peerless Roofing Co., Ltd. v. NLRB*, 641 F.2d 734 (9th Cir. 1981); *Producers Dairy Delivery Co., Inc. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625 (9th Cir. 1981).

jurisdiction where an employer fails to make contributions in accordance with the terms and conditions of the plan.<sup>4</sup>

Section 515 of ERISA augments and reflects the traditional requirement to maintain the status quo pending impasse and the Court, therefore, does not need to rely solely on Section 8(a)(5) of the National Labor Relations Act as amended (NLRA), 29 U.S.C. Section 158(a)(5), to generate a basis for the employer's obligation to contribute.

This is simplified by ERISA's directive that "nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . ." Section 514 of ERISA, 29 U.S.C. Section 1144.

Section 515 of ERISA does not supersede, but rather, is a mirror image of the NLRA's statutory obligation to maintain the status quo, pursuant to Section 8(a)(5) of the NLRA, and enhances that image by providing a more effective forum to seek redress for the breach of the employer's obligation to contribute.<sup>5</sup>

---

<sup>4</sup> Congress also recognized that the obligation to contribute was not without some limitation and included the qualification that the employer is obligated to contribute so long as that obligation is not inconsistent with law. The use of the phrase "to the extent not inconsistent with law" recognizes, as did the Court in *Hinson, supra*, that contributions can only be made to trust funds so long as they meet the requirements of Section 302(c)(5)(b) of ERISA, or are not illegal under some other statutory scheme. *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72 (1982).

<sup>5</sup> The concept of an election between equally available Federal remedies was recognized in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 635 N. 17 (1975), wherein the Court stated that "In most cases a decision that state law if pre-empted leaves the parties with recourse only to the federal labor law, as enforced by the NLRB. See *Lockridge, supra*; *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). But in cases like this

**B. THE COURT'S CONSIDERATION OF THE NLRA IS COLLATERAL TO THE PRIMARY ISSUE OF THE EMPLOYER'S VIOLATION OF SECTION 515 OF ERISA**

Upholding the District Court's jurisdiction under Sections 502 and 515 of ERISA, 29 U.S.C. Sections 1132 and 1145, is consistent with those cases which have held that District Court jurisdiction is proper even where the issues raised would normally be considered in the context of a "board" proceeding.

In *Kaiser Steel Corporation v. Mullins*, 445 U.S. 72, (1982), citing *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975), this Court held that:

" 'the Federal Courts may decide Labor Law questions that emerge as collateral issues in suits brought under independent Federal remedies, including the Anti-Trust Laws.' "

This action involves the independent Federal remedy created by Section 515 of ERISA and is co-extensive with the obligation to maintain the status quo under Section 8(a)(5) of the NLRA. Therefore, the Court's consideration of Section 8(a)(5) of the NLRA is collateral to the primary issue of the employer's violation of Section 515 of ERISA.

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one, where there is an independent federal remedy that is consistent with the NLRA, the parties may have a choice of federal remedies. Cf. *Vaca v. Sipes*, 386 U.S. 171, 176-188 (1967); *Smith v. Evening News Assn.*, 371 U.S. 195 (1962)."

This is further demonstrated by reference to the relief sought by petitioners; that is, enforcement of the employer's obligation to make contributions under the terms of the plan, and not an order compelling the employer to collectively bargain with the Union.<sup>6</sup>

In addition, the Courts have not hesitated to assume jurisdiction where contract actions have necessarily involved an infringement upon areas traditionally reserved for the National Labor Relations Board. Those areas have included: a determination as to the illegality of a contract under Section 8(e);<sup>7</sup> the violation of Federal anti-trust laws;<sup>8</sup> and, breaches of collective bargaining agreements, even though a breach may also constitute an unfair labor practice.<sup>9</sup>

Allowing jurisdiction to consider an employer's obligation pursuant to the plan terms and after contract expiration represents only a minor intrusion into an area of traditional Board jurisdiction. The Courts are fully competent to make determinations regarding the extent of an employer's monetary obligations and a determination as to when impasse has been reached.<sup>10</sup>

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<sup>6</sup> *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938), wherein the Court stated that the objective of the National Labor Relations Act with respect to collective bargaining between an employer and an employee organization was "the making of contracts with labor organizations."

<sup>7</sup> *Kaiser Steel Corporation v. Mullins, supra.*

<sup>8</sup> *Connell Construction Company, Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975)

<sup>9</sup> *William E. Arnold Co. v. Carpenters*, 417 U.S. 12 (1974); *Smith v. Evening News Association*, 371 U.S. 195 (1962)

<sup>10</sup> *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1981), wherein the Court, in the context of determining withdrawal liability pursuant to

**C. REQUIRING RESORT TO THE NLRB RUNS CONTRARY TO THE EXPRESS PURPOSES OF ERISA AND NEED-LESSLY LENGTHENS LITIGATION**

It is well established that the National Labor Relations Act is a remedial statute, *NLRB v. Food Store Employees Local 347 (Heck's Inc.)*, 471 U.S. 1 (1974), and relief under the Act is traditionally limited to back-pay,<sup>11</sup> or an order to cease and desist an unfair labor practice (such as failure to bargain in good faith).<sup>12</sup> ERISA and the MPPAA<sup>13</sup> were congressional attempts to stem the rising tide of Trust Fund delinquencies when the mechanisms available through the Board were shown to be inadequate. The legislative history is replete with expressions of congressional dissatisfaction with remedies theretofore available, either through the Board or through State Courts.

The Courts have recognized this legislative intent. In *Laborers' Fringe Benefit Funds — Detroit & Vicinity v. Northwest Concrete & Const., Inc.*, 640 F.2d 1350, 1352 (6th Cir. 1981), the Court stated:

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MPPAA, directed the District Court to determine whether or not impasse had occurred. The determination of impasse in the Woodward Sand context is no different than a determination of impasse relative to an employer's obligation to contribute pursuant to Section 515 after contract expiration.

<sup>11</sup> *F. W. Woolworth Company and Retail Clerks International Association (AFL)*, 90 NLRB 289 (1950)

<sup>12</sup> *Mar-Jac Poultry Company, Inc. and Local 454 Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO*, 136 NLRB 785 9 (1962)

<sup>13</sup> Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208.

The legislative history underlying Section 502 [29 U.S.C. § 1132] indicates that Congress intended that the enforcement provisions should have teeth: the provisions should be liberally construed to 'provide both the Secretary [of Labor] and participants and beneficiaries with broad remedies for redressing or preventing violations of the Act.' H. R. REP. No. 93-533, 93d CONG. & AD. NEWS 4639, 4655. This history further states that '[T]he intent of the Committee is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appears to have hampered effective enforcement of fiduciary responsibilities under state law for recovery of benefits due to participants.'

Again, the overriding congressional concern over the Trust Funds' ability to pursue enforcement of the plan terms was recognized by the Court in *Central States Southeast and Southwest Areas Pension Funds v. Alco Express Co.*, 522 F.Supp. 919, 926 (E.D. Mich. 1981), wherein the Court stated that:

From the inception of Section 306 [29 U.S.C. § 1132(g) and 1145] in 1978 to its birth in 1980 [by the MPPAA], its gestation period was accompanied by an acute parental concern over the adverse effect of delinquencies on multiemployer plans and the need to strengthen ERISA to enhance the ability of multiemployer plan trustees to enforce employer obligations to make contributions and to discourage delinquency.

Requiring the Trust Funds to resort to the NLRB would not only hinder enforcement of the employer's obligation to

contribute as defined by the plan terms, but would also defeat the clear congressional intent to have the express ERISA remedies enforced in Federal District Court. In addition to the collection of unpaid fringe benefit contributions and, consistent with this legislative intent, ERISA provides for: plan-authorized prejudgment interest; plus the greater of interest on the unpaid contributions or plan-authorized liquidated damages; and, costs of the action and reasonable attorney's fees, Section 502(g)(2) of ERISA, 29 U.S.C. Section 1132(g)(2). The so-called "double interest" provision of Section 502(g)(2)(c) of ERISA, Section 1132(g)(2)(c), is clearly designed to have a deterrent effect on those employers who might be inclined to withhold contributions. *Central States, etc. v. Alco Express, supra*, at 931.

As further evidence of the importance of securing fringe benefit payments through the District Courts, Section 502(a)(3)(A) of ERISA, 29 U.S.C. Section 1132, provides a quick avenue by which to seek injunctive relief. The Courts have readily granted such relief in favor of multi-employer funds against delinquent employers. *Laborers Fringe Benefit Funds v. Northwest Concrete, etc., supra*, at 1351-52; *Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457 (3rd Cir. 1978); *Van Drivers Union, Local No. 392 v. Nealy Moving & Storage*, 551 F.Supp. 429 (N.D. Ohio, 1982).

The Ninth Circuit's decision herein negates the remedies provided by Congress in ERISA by forcing the Trust Funds to resort to the National Labor Relations Board when the plan terms are still in effect.

Not only will the remedies provided by ERISA be lost to the Petitioners if the decision stands, but a resort to the National Labor Relations Board adds time-consuming extra proceedings to actions to enforce the plan terms. Moreover,

it is precisely this time-consuming process which Congress intended to avoid by providing jurisdiction in the District Courts pursuant to Section 515 of ERISA.

The necessity of providing an effective and speedy remedy for ERISA enforcement is illustrated by the complexity and uncertainty in resorting to the National Labor Relations Board. For example, the Trust funds would first have to file a charge with the appropriate Regional office.<sup>14</sup> Investigation of the claim by the Regional office typically takes thirty (30) days. If the Region decides to proceed, a complaint is filed.<sup>15</sup> After a mandatory settlement conference<sup>16</sup> the matter is calendared to be heard before an Administrative Law Judge<sup>17</sup> (usually many months later). If the employer files exceptions to the findings of the Administrative Law Judge,<sup>18</sup> the matter is put before the Board itself. The current backlog of cases on appeal to the Board, in some instances well over three (3) years, has been the subject of recent congressional criticism. The Board's orders are not self-enforcing, and the General Counsel must move for enforcement proceedings before the appropriate Circuit Court. Thus, an intervening period of up to five (5) years before an enforceable Court Order is obtained would supplant the direct access to the Courts clearly intended by Congress.

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<sup>14</sup> Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102.9

<sup>15</sup> 29 C.F.R. § 102.15

<sup>16</sup> NLRB Case Handling Manual, Pt. 1, Unfair Labor Practice Proceedings, ¶ 10124-10194

<sup>17</sup> 29 C.F.R. § 102.34

<sup>18</sup> 29 C.F.R. § 102.46

III

**CONCLUSION**

For the reasons given above, the petition for a Writ of Certiorari should be granted.

Dated: July 14, 1986

Respectfully submitted,

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---

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85-2079

No. ....

U  
Supreme Court, U.S.  
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In the Supreme Court  
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OCTOBER TERM, 1985

LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, et al.,  
Petitioners,

vs.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
Respondent.

On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

BRIEF OF AMICUS CURIAE

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## **QUESTION PRESENTED**

Does a United States District Court have jurisdiction pursuant to Sections 502 and 515 of the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement as long as the employer has a duty under applicable labor-management relations law to make such contributions?

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**In the Supreme Court  
OF THE  
United States**

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**OCTOBER TERM, 1985**

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**LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, et al.,  
*Petitioners,***

**vs.**

**ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent.***

---

**On Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF OF AMICUS CURIAE**

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**INTEREST OF CARPENTERS  
SOUTHERN CALIFORNIA,  
ADMINISTRATIVE CORPORATION, INC.**

Carpenters Southern California Administrative Corporation, Inc. ("CSCAC"), is a non-profit corporation organized under the laws of the State of California for the purpose of administering the Carpenters Health and Welfare Trust for Southern California, the Carpenters Pension Trust for Southern California, the 11 County

Carpenters Vacation Savings and Holiday Plan, and the Carpenters Joint Apprenticeship and Training Committee Fund for Southern California ("Carpenters Trusts"). The Carpenters Trusts are multiemployer employee benefit plans established pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947, as amended ("LMRA"), 29 U.S.C. § 186(c)(5) and the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208.

The Carpenters Trusts were created by a collective bargaining and trust agreements between the Associated General Contractors of California, Inc., the Building Industry Association of Southern California Inc. and the Southern California Contractors Association, Inc. and the District Councils and Local Unions in the Eleven (11) Southern California Counties affiliated with the United Brotherhood of Carpenters and Joiners of America.

Among its various functions and duties, CSCAC monitors the compliance of over 8,000 signatory employers participating in the various multiemployer trusts which it administers. When necessary, CSCAC brings suit in both federal and state courts to enforce the provisions of the collective bargaining and trust agreements and to ensure that the appropriate fringe benefit contributions are timely paid by the participating signatory employers.

The question presented for review in the Petition for a Writ of Certiorari is of the utmost importance to the thousands of carpentry employees and their dependents who are the beneficiaries of the various employee benefit plans which CSCAC administers. Consequently, CSCAC has a vital interest in seeking review of the lower court's decision. If that court decision is left intact, CSCAC will be effectively hamstrung in its efforts to monitor and

compel compliance of the obligations imposed on the employer in all post-termination, pre-impasse situations. If CSCAC is foreclosed from bringing suit in the United States District Court to enforce post-termination, pre-impasse obligations and to collect delinquent fringe benefit contributions, the inevitable drain on trust assets could devastate the financial integrity of the Carpenters Trusts and cause incalculable harm to the beneficiaries of the trusts and their dependents.

Petitioner and Respondent have consented to the filing of this brief.

#### SUMMARY OF ARGUMENT

The decision below raises issues of extreme significance. The Petition for a Writ of Certiorari filed by Petitioner fully discusses the policies, language, legislative history and comprehensive statutory scheme of ERISA, 29 U.S.C. §§ 1001-1461, as amended by MPPAA. Additionally, the Petition adequately discusses how the decision below conflicts with other decisions of this Court. CSCAC strongly adopts the views put forth by Petitioner.

In this brief, we will focus on the inadequacy of the National Labor Relations Board (the "Board") as a forum for the collection of post-termination, pre-impasse fringe benefit contribution delinquencies.

## ARGUMENT: REASONS FOR GRANTING THE WRIT

**The Board, While Providing an Adequate Forum for Resolving Labor-Management Disputes and Remedy-ing Unfair Labor Practices, is a Wholly Inadequate Arena for the Collection of Delinquent Fringe Bene-fit Contributions.**

Congress would not impose upon the trustees of a multiemployer trust fund a fiduciary duty to maintain the fiscal security of the trust fund without providing an available and adequate forum in which to proceed. See *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416 (9th Cir. 1983). Implicit in the lower court's finding that section 515 of ERISA, 29 U.S.C. § 1145, does not provide for jurisdiction over actions seeking to recover post-termination, pre-impasse fringe benefit contribution delinquencies, is the conclu-sion that the Board would provide the trust funds with an *adequate* forum in which to obtain relief. For a plethora of reasons, this underlying assumption relied upon by the lower court is invalid. Accordingly, the lower court's ultimate conclusion is fatally flawed.

First, there is no guarantee that the Board will choose to exercise jurisdiction over charges filed by a trust fund. Generally, the Board will only exercise jurisdiction if a non-retail employer meets the jurisdictional standards by directly and indirectly purchasing goods and services valued above \$50,000 from outside the state. *Snowshoe Company*, 212 NLRB No. 29 (1974). Many employers bound to contribute to the various trusts administered by CSCAC would not meet the Board's jurisdictional stan-dards. Many small construction contractors would be able to evade their obligations to make trust fund contribu-tions as the Board would decline to exercise jurisdiction over them. Moreover, even when the employer meets the

Board's jurisdictional standards, the Board is not required to exercise its jurisdiction. The Board has the discretion to refuse to entertain certain disputes. 29 U.S.C. § 164(c)(1) provides:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of Title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

The Board has expressed a reluctance to be used as a collection agency for trust funds. In *Rapid Fur Dressing, Inc.*, 278 NLRB No. 126 (1986), the Board found that an employer who unilaterally ceased to make contractually required payments to a trust fund violated sections 8(a)(5) and (1) of the National Labor Relations Act ("NLRA"). In dissenting, Chairman Dotson stated, "It is an unwise policy for the Board, with its heavy workload, to serve as a monitor for contract compliance...." In *Can-Do, Inc.*, 279 NLRB No. 108 (1986), Chairman Dotson reiterated his opposition to the Board "allowing itself to be used as a collection agency."

It is unlikely that a trust fund would find a receptive forum in the Board. Especially in light of the backlog of cases faced by the Board. In an article for the *Labor Law Journal*, Chairman Dotson wrote:

As of [December] 1, 1983, the backlog (the cases on hand) was [1355] C cases . . . and [326] R cases . . . ,

representing the largest volume of cases in the agency's history.

\* \* \*

Concurrent with the growing number of pending cases, the Board has issued fewer decisions and, I must report, has taken longer to issue them.

35 Lab. L.J. 5 (1984).<sup>1</sup>

Because of the backlog of cases before the Board, it may decide that collecting delinquent contributions for thousands of employers detracts its attention from what it perceives to be more significant matters.

If the Board refuses to be used as a collection agency or is unable to effectively handle the increased workload the trust funds will be without a remedy. Should the Board refuse to issue complaints the trust funds will not be able to seek review by the courts. Therefore, there is no guarantee that trust funds will have an available forum to recover delinquent contributions owing after the expiration of a collective bargaining agreement.

Second, the Board's six-month Statute of Limitations, 29 U.S.C. § 160(b), is impractical and imposes an impossible burden upon the trust funds. In a typical unfair labor practice situation, both the charging and charged party will have first-hand knowledge of the underlying

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<sup>1</sup>The huge backlog of cases pending before the Board creates an additional burden for trust funds. The delay in collecting contributions by the Board would result in the loss of investment income that could be earned if contributions were quickly recovered. Participants and beneficiaries of the trust funds suffer by receiving lower benefits. Employers who make the required contributions will suffer by being required to pay increased contribution rates and the potential withdrawal liability of employers may increase.

facts giving rise to the filing of the charge. However, in cases involving trust funds, such is not the case.

The Carpenters Trusts are not parties to the collective bargaining and trust agreements; they are simply the third-party beneficiaries of those agreements. Typically, the trust funds do not have a daily working relationship with either the Union or the employer. See *NLRB v. Amax Coal Company*, 453 U.S. 322 (1981); *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364 (1984). Consequently, the trust funds would rarely have any first-hand knowledge of the commission of an unfair labor practice by the employer.

A typical scenario will illuminate the trust funds' predicament: An employer opts to terminate his collective bargaining agreement, begins to negotiate with the Union and continues to submit fringe benefit contributions. Notice of the termination is required to be sent to the Union, *not* the trust funds. Consequently, unless either the employer or the Union subsequently notifies the trust funds of the termination, the trust funds have no notice that the employer has terminated.

Since the employer continues to submit fringe benefit contributions to the trust funds, for all intents and purposes that employer would appear to be no different from an employer who had not terminated. Absent notice, the trust funds have no practical way of distinguishing between the two classes of employers. The six-month Statute of Limitations could run long before the trust funds learned of the termination of the collective bargaining agreement.

Assuming *arguendo* that the trust funds will always be notified of the termination of a collective bargaining agreement, the six-month Statute of Limitations would nevertheless impose an insurmountable obstacle to a trust

fund. Typically, the only method the trust funds have at their disposal to verify an employer's compliance with the provisions of the collective bargaining agreement with respect to fringe benefit contributions, is through an audit of the employer's books and records. In the example above, as long as contributions were made the employer would appear to be complying with §§ 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1) and 158(a)(5). However, until an audit of the employer's books and records can be conducted, it cannot be accurately ascertained whether the employer is in compliance or has committed an unfair labor practice. Meanwhile, the clock of the Board's six-month Statute of Limitations is relentlessly ticking.

The trust funds will be placed between Scylla and Charybdis. In order to adequately protect itself (and the beneficiaries) the trust funds would be forced to file an unfair labor practice charge against every employer who has tendered a termination to the Union, regardless of whether the employer appears to be properly paying the requisite fringe benefit contributions. Or they would have to bear the enormous expense of conducting a continuing audit of each terminating employer. Until such time as an audit can be conducted, the Carpenters Trusts cannot know whether an unfair labor practice has occurred.

To further compound the problem, negotiations can continue for months, and in some situations, years. Trust funds will be required to ascertain the status of countless negotiations. Every six months, the trust funds would be forced to file new unfair labor charges with the Board or continue monitoring the employer's records. Failure to do so could expose the trustees to a charge of negligence of their fiduciary duties. See *Kaufman & Broad, supra*.

The Carpenters Trusts have been made aware of approximately one hundred (100) employers who have ter-

minated their collective bargaining and trust agreements with the Union as of July 1, 1986. If the lower court decision is allowed to stand, the Carpenters Trusts will be forced to file approximately 100 unfair labor practice charges with the Board; many of which will have no apparent basis in fact, but which have to be filed to protect against the running of the Board's Statute of Limitations, or employ scores of auditors to quickly begin auditing the terminating employer's records. If the lower court ruling is allowed to stand, the Board will be inundated, nationwide, with thousands of unfair labor practice charges filed by multiemployer trust funds, solely to protect against the running of the Board's six-month Statute of Limitations. As stated above, this would substantially increase the workload of an already overworked Board.

Third, there is a substantial difference in the remedies available to a trust fund before the Board or the courts. In the courts, a trust fund is entitled to recover the unpaid contributions, interest on the unpaid contributions, an amount equal to the interest on the unpaid contributions or liquidated damages provided for under the plan, and reasonable attorneys' fees and costs of action. 29 U.S.C. § 1132(g)(2). When Congress enacted ERISA it was aware of the losses a trust fund incurs when contributions are not paid in a timely fashion. The trust fund loses the benefit of investment income plus incurs increased administrative costs in detecting and collecting delinquencies. Accordingly, Congress provided for a full array of available remedies.

The purpose of the NLRA, however, is remedial. *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. \_\_\_, 106 S.Ct. 1057, 1062 n. 5 (1986). The Board's make whole remedy would allow only for the recovery of unpaid contributions and would not

include double interest or liquidated damages or attorneys' fees. Such a remedy would not fully compensate a trust fund for its loss of investment income or its increased administrative costs.

The NLRA's remedial philosophy poses a further problem for trust funds. Once an unfair labor practice charge has been filed, the investigation, issuance of a complaint, prosecution of the case and enforcement is conducted by the Board. 29 C.F.R. §§ 101.2, 101.4, 102 *et seq.* The trustees of the trust fund, who are charged with maintaining the fiscal integrity of the fund, have no control over the action. The Board could refuse to issue a complaint. Or the Board could agree to a settlement even over the objections of the trustees. 29 C.F.R. § 101.9(c). The Board has no fiduciary duties to the participants and beneficiaries of the trust fund. Therefore, if, in the Board's view, a settlement would effectuate the purpose of the NLRA a matter will be settled despite the loss to the trust fund.

Fourth, because the Board controls the investigation and prosecution of charges, trust funds will lose their ability to conduct audits. This Court, in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. \_\_\_, 105 S.Ct. 2833, 86 L.Ed. 2d 447 (1985), upheld the right of trustees to conduct audits and emphasized the importance of audits.

Most trust funds are experienced in the auditing of employer's books and records and have developed sophisticated in-house auditing programs or utilize auditing firms to verify an employer's compliance with the terms of the agreements. The Board lacks such expertise. It is impossible for a Board Agent, untrained in accounting principles, to conduct a thorough investigation. Consequently, many employers will be able to avoid liability

simply because of the Board's lack of expertise and resources.

Fifth, the requirement imposed by the lower court to file charges with the Board would require that a multiplicity of actions be brought by the trust funds. Suits to collect pre-termination delinquencies would be brought before the United States District Court. Post-termination, pre-impasse delinquencies would of necessity be brought before the Board. Congress could not have envisioned this result when it enacted the MPPAA seeking to insure a quick and inexpensive means for collecting delinquent contributions.

Post-liability suits to collect withdrawal liability would be brought before the United States District Court. Both pre-impasse delinquencies and withdrawal liability cases necessarily decide the issue of when and if impasse was reached. It is conceivable that the Board and the court may reach conflicting results. Although the lower court in the instant case reasoned that the Board had the particular expertise to decide the perplexing issue as to when impasse was reached, the lower court ignored the fact that the District Court must make the same analysis in determining whether an employer has any withdrawal liability. As the issue is identical, it defies logic to assert that in the one situation the District Court possesses the expertise to resolve the issue, while in a second situation requiring the same analysis, the Court does not possess the requisite expertise.

## CONCLUSION

The decision of the Court below limiting the bringing of an action to collect post-termination, pre-impasse fringe benefit contribution delinquencies to the Board (to the exclusion of the federal District Courts) creates insurmountable obstacles preventing the trustees of multiemployer trust funds from the performance of their fiduciary duties. Additionally, the ruling below reaches a result which defies logic and opens the floodgates of litigation by demanding the needless filing of a multiplicity of actions in various forums to redress related wrongs. The issue is one of great legal and practical importance to multiemployer trust funds throughout the nation and should be decided by this Court.

Respectfully submitted,

Law Offices of  
RICHARD A. BROWNSTEIN

By: COLIN M. LONG  
*Attorneys for Amicus Curiae*  
*Carpenters Southern California*  
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## **PROOF OF SERVICE BY MAIL**

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On July 15, 1986, I served the within Brief of Amicus Curiae in re: "Laborers Health and Welfare Trust Fund for Northern California, et al. vs. Advanced Lightweight Concrete Co., Inc." in the United States Supreme Court, October Term 1985, No. ....;

on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

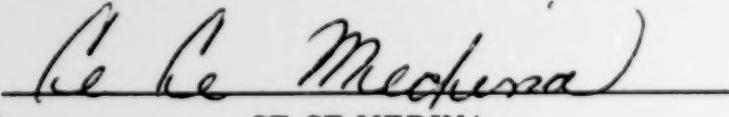
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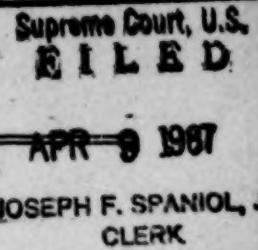
All Parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 15, 1986, at Los Angeles, California.

  
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(8)  
No. 85-2079



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## **QUESTION PRESENTED**

**Does a United States District Court have jurisdiction pursuant to Sections 502 and 515 of the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement where the employer's obligation arises from its duties under section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. 158(a)(5)?**

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The question presented for review is of the utmost importance to the thousands of carpentry employees and their dependents who are the beneficiaries of the various employee benefit plans which CSCAC administers. Consequently, CSCAC has a vital interest in seeking review of the appellate court's decision. If that court's decision is left intact, CSCAC will be effectively hamstrung in its efforts to monitor and compel compliance with the obligations imposed on the employer in all post-termination, pre-impasse situations. If CSCAC is foreclosed from

bringing suit in the United States District Court to enforce post-termination, pre-impasse obligations and to collect delinquent fringe benefit contributions, the inevitable drain on trust assets could devastate the financial integrity of the Carpenters Trusts and cause incalculable harm to the beneficiaries of the trusts and their dependents.

Petitioner and Respondent have consented to the filing of this brief.

### **SUMMARY OF ARGUMENT**

The decision below raises issues of extreme significance. This brief will discuss how the legislative history and statutory scheme of ERISA, 29 U.S.C. §§ 1001-1461, as amended by MPPAA demonstrate that section 515 of ERISA encompasses actions brought by multiemployer employee benefit plans to collect delinquencies arising under section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5).

This brief, also will focus on the inadequacy of the National Labor Relations Board (the "Board") as a forum for the collection of post-termination, pre-impasse fringe benefit contribution delinquencies.

### **ARGUMENT**

- 1. Section 515 of ERISA Encompasses Legal Actions by Multiemployer Employee Benefit Plans to Collect Post-Termination, Pre-Impasse Delinquencies Arising Under Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5).**

The relationship between a multiemployer employee benefit plan and an employer is a complex one which, for

purposes herein, can be broken down into three basic time periods: (1) the period during which the employer is signatory to an extant collective bargaining agreement; (2) the post-termination, pre-impasse period; and (3) withdrawal.

Section 515 of ERISA, 29 U.S.C. § 1145 provides:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

It is well settled that district courts have jurisdiction under section 502(a)(3) over violations of section 515 of ERISA, 29 U.S.C. § 1145 which occur during the period when an employer is signatory to an extant collective bargaining agreement. See *Laborers Health & Welfare Trust Fund v. Hess*, 594 F.Supp. 273, 278 (N.D. Cal. 1984).

It is equally settled that, under section 4212(a) of ERISA, 29 U.S.C. § 13929(a), district courts have jurisdiction over withdrawal liability. See *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1986).

A review of the legislative history, statutory language and the underlying statutory scheme lead inevitably to the conclusion that Congress intended that district courts also have jurisdiction over delinquencies which accrue during the post-termination, pre-impasse period.

The MPPAA were enacted in response to Congressional concern over the continued financial stability of multiemployer employee benefit plans. See MPPAA sec. 3, 29 U.S.C. § 1001(a). See generally H. R. Rep. No. 869

(part I), 96th Cong. 2d Sess. (1980). Congress perceived that the failure of employers to timely pay their fringe benefit contributions, coupled with the conversion of simple collection actions brought by the trusts into lengthy, costly and complex litigation, was a very real threat to the financial future of the trust funds. To remedy this problem, section 515 was enacted to provide to the trusts an uncomplicated, unambiguous, federal cause of action for the collection of delinquent fringe benefits contributions.

Concurrently with the enactment of MPPAA, Congress enacted section 4212(a) of ERISA requiring that employers withdrawing from multiemployer employee benefit plans pay to the plans the unfunded vested liability attributable to their employees' participation in the plans. Section 515 of ERISA also acts as the enforcement mechanism for section 4212(a).

Sections 515 and 4212(a) were created in tandem as part of a comprehensive federal scheme designed to facilitate the continued growth and promote the financial stability of multiemployer employee benefit plans throughout the full scope of the relationship between the Trust Funds and the employer. Given the stated goals of Congress in enacting the MPPAA, the appellate court's attempt to carve out the post-termination, pre-impasse time frame and hand it exclusively to the NLRB for enforcement of the employers' obligations under section 8(a)(5) makes no sense.

There is no legislature history that supports the notion that Congress intended that the Trusts seek recovery of delinquent fringe benefit contributions in different forums simply because of the time frame in which the delinquencies arose. To the contrary, Congress intended to create *one* enforcement mechanism to give the Trusts a straightforward, unambiguous federal cause of action for

the collection of *any* delinquent fringe benefit contributions. The appellate court's rationale ignores the stated intent and frustrates the result envisioned by Congress.

Likewise, there is no practical sense in splitting the enforcement of delinquent fringe benefit contributions between the district courts and NLRB. The NLRB has no particular monopoly in expertise to determine when post-termination, pre-impasse obligation ceases. The district courts must make the very same analysis in withdrawal liability situations under section 515. As Congress determined that the district court's expertise was sufficient in a lawsuit under section 4212(a) pursuant to section 515 to determine when a post-termination, pre-impasse obligations under section 8(a)(5) ceased, it necessarily follows that the district court is a competent forum to make the very same analysis under section 515 for the purpose of collecting delinquent fringe benefit contributions arising subsequent to termination but prior to withdrawal.

**2. The Board, While Providing an Adequate Forum for Resolving Labor-Management Disputes and Remedyng Unfair Labor Practices, is a Wholly Inadequate Arena for the Collection of Delinquent Fringe Benefit Contributions.**

Congress would not impose upon the trustees of a multiemployer trust fund a fiduciary duty to maintain the fiscal security of the trust fund without providing an available and adequate forum in which to proceed. See *Laborers Health and Welfare Trust Fund v. Kaufman & Broad*, 707 F.2d 412, 416 (9th Cir. 1983). Implicit in the appellate court's finding that section 515 of ERISA, 29 U.S.C. § 1145, does not provide for jurisdiction over actions seeking to recover post-termination, pre-impasse fringe benefit contribution delinquencies, is the conclu-

sion that the Board would provide the trust funds with an *adequate* forum in which to obtain relief. For a plethora of reasons, this underlying assumption relied upon by the appellate court is invalid. Accordingly, the appellate court's ultimate conclusion is fatally flawed.

First, there is no guarantee that the Board will choose to exercise jurisdiction over charges filed by a trust fund. Generally, the Board will only exercise jurisdiction if a non-retail employer meets the jurisdictional standards by directly and indirectly purchasing goods and services valued above \$50,000 from outside the state. *Snowshoe Company*, 212 NLRB No. 29 (1974). Many employers bound to contribute to the various trusts administered by CSCAC would not meet the Board's jurisdictional standards. Many small construction contractors would be able to evade their obligations to make trust fund contributions as the Board would decline to exercise jurisdiction over them. Moreover, even when the employer meets the Board's jurisdictional standards, the Board is not required to exercise its jurisdiction. The Board has the discretion to refuse to entertain certain disputes. 29 U.S.C. § 164(c)(1) provides:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction over the standards prevailing upon August 1, 1959.

The Board has expressed a reluctance to be used as a collection agency for trust funds. In *Rapid Fur Dressing, Inc.*, 278 NLRB No. 126 (1986), the Board found that an employer who unilaterally ceased to make contractually required payments to a trust fund violated sections 8(a)(5) and (1) of the National Labor Relations Act ("NLRA"). In dissenting, Chairman Dotson stated, "it is an unwise policy for the Board, with its heavy workload, to serve as a monitor for contract compliance ...." In *Can-Do, Inc.*, 279 NLRB No. 108 (1986), Chairman Dotson reiterated his opposition to the Board "allowing itself to be used as a collection agency."

It is unlikely that a trust fund would find a receptive forum in the Board. Especially in light of the backlog of cases faced by the Board. In an article for the *Labor Law Journal*, Chairman Dotson wrote:

As of [December] 1, 1983, the backlog (the cases on hand) was [1355] C cases . . . and [326] R cases . . . , representing the largest volume of cases in the agency's history.

\* \* \*

Concurrent with the growing number of pending cases, the Board has issued fewer decisions and, I must report, has taken longer to issue them.

35 Lab. L.J. 5 (1984).<sup>1</sup>

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<sup>1</sup>The huge backlog of cases pending before the Board creates an additional burden for trust funds. The delay in collecting contributions by the Board would result in the loss of investment income that could be earned if contributions were quickly recovered. Participants and beneficiaries of the trust funds suffer by receiving lower benefits. Employers who make the required contributions will suffer by being required to pay increased contribution rates and the potential withdrawal liability of employers may increase.

Because of the backlog of cases before the Board, it may decide that collecting delinquent contributions for thousands of employers detracts its attention from what it perceives to be more significant matters.

If the Board refuses to be used as a collection agency or is unable to effectively handle the increased workload, the trust funds will be without a remedy. Should the Board refuse to issue complaints the trust funds will not be able to seek review by the courts. Therefore, there is no guarantee that trust funds will have an available forum to recover delinquent contributions owing after the expiration of a collective bargaining agreement.

Second, the Board's six-month Statute of Limitations, 29 U.S.C. § 160(b), is impractical and imposes an impossible burden upon the trust funds. In a typical unfair labor practice situation, both the charging and charged party will have first-hand knowledge of the underlying facts giving rise to the filing of the charge. However, in cases involving trust funds, such is not the case.

The Carpenters Trusts are not parties to the collective bargaining and trust agreements; they are simply the third-party beneficiaries of those agreements. Typically, the trust funds do not have a daily working relationship with either the Union or the employer. See *NLRB v. Amax Coal Company*, 453 U.S. 322 (1981); *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364 (1984). Consequently, the trust funds would rarely have any first-hand knowledge of the commission of an unfair labor practice by the employer.

A typical scenario will illuminate the trust funds' predicament: An employer opts to terminate his collective bargaining agreement, begins to negotiate with the Union and continues to submit fringe benefit contributions.

Notice of the termination is required to be sent to the Union, *not* the trust funds. Consequently, unless either the employer or the Union subsequently notifies the trust funds of the termination, the trust funds have no notice that the employer has terminated.

Since the employer continues to submit fringe benefit contributions to the trust funds, for all intents and purposes that employer would appear to be no different from an employer who had not terminated. Absent notice, the trust funds have no practical way of distinguishing between the two classes of employers. The six-month Statute of Limitations could run long before the trust funds learned of the termination of the collective bargaining agreement.

Assuming *arguendo* that the trust funds will always be notified of the termination of a collective bargaining agreement, the six-month Statute of Limitations would nevertheless impose an insurmountable obstacle to a trust fund. Typically, the only method the trust funds have at their disposal to verify an employer's compliance with the provisions of the collective bargaining agreement with respect to fringe benefit contributions, is through an audit of the employer's books and records. In the example above, as long as contributions were made the employer would appear to be complying with §§ 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1) and 158(a)(5). However, until an audit of the employer's books and records can be conducted, it cannot be accurately ascertained whether the employer is in compliance or has committed an unfair labor practice. Meanwhile, the clock of the Board's six-month Statute of Limitations is relentlessly ticking.

In order to adequately protect itself (and the beneficiaries) the trust funds would be forced to file an unfair

labor practice charge against every employer who has tendered a termination to the union, regardless of whether the employer appears to be properly paying the requisite fringe benefit contributions. Alternatively, the enormous expense of conducting a continuing audit of each terminating employer would have to be borne. Until such time as an audit can be conducted, the Carpenters Trusts cannot know whether an unfair labor practice has occurred.

To further compound the problem, negotiations can continue for months, and in some situations, years. Trust funds will be required to ascertain the status of countless negotiations. Every six months, the trust funds would be forced to file new unfair labor charges with the Board or continue monitoring the employer's records. Failure to do so could expose the trustees to a charge of negligence of their fiduciary duties. See *Kaufman & Broad, supra*.

If the appellate court's ruling is allowed to stand, the Board will be inundated, nationwide, with thousands of unfair labor practice charges filed by multiemployer trust funds, solely to protect against the running of the Board's six-month Statute of Limitations. As stated above, this would substantially increase the workload of an already overworked Board.

Third, there is a substantial difference in the remedies available to a trust fund before the Board or the courts. In the courts, a trust fund is entitled to recover the unpaid contributions, interest on the unpaid contributions, an amount equal to the interest on the unpaid contributions or liquidated damages provided for under the plan, and reasonable attorneys' fees and costs of action. 29 U.S.C. § 1132(g)(2). When Congress enacted ERISA it was aware of the losses a trust fund incurs when contributions are not paid in a timely fashion. The

trust fund loses the benefit of investment income plus incurs increased administrative costs in detecting and collecting delinquencies. Accordingly, Congress provided for a full array of available remedies.

The purpose of the NLRA, however, is remedial. *Wisconsin Department of Industry, Labor and Human Relations v. Gould*, 475 U.S. \_\_\_, 106 S.Ct. 1057, 1062 n. 5 (1986). The Board's make whole remedy would allow only for the recovery of unpaid contributions and would not include double interest or liquidated damages or attorneys' fees. Such a remedy would not fully compensate a trust fund for its loss of investment income or its increased administrative costs.

The NLRA's remedial philosophy poses a further problem for trust funds. Once an unfair labor practice charge has been filed, the investigation, issuance of a complaint, prosecution of the case and enforcement is conducted by the Board. 29 C.F.R. §§ 101.2, 101.4, 102 *et seq.* The trustees of the trust fund, who are charged with maintaining the fiscal integrity of the fund, have no control over the action. The Board could refuse to issue a complaint. Or the Board could agree to a settlement even over the objections of the trustees. 29 C.F.R. § 101.9(c). The Board has no fiduciary duty to the participants and beneficiaries of the trust fund. Therefore, if, in the Board's view, a settlement would effectuate the purpose of the NLRA a matter will be settled despite the loss to the trust funds.

Fourth, because the Board controls the investigation and prosecution of charges, trust funds will lose their ability to conduct audits. This Court, in *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. \_\_\_, 105 S.Ct. 2833, 86 L.Ed. 2d

447 (1985), upheld the right of trustees to conduct audits and emphasized the importance of audits.

Most trust funds are experienced in the auditing of employer's books and records and have developed sophisticated in-house auditing programs or utilize auditing firms to verify an employer's compliance with the terms of the agreements. The Board lacks such expertise. It is impossible for a Board Agent, untrained and inexperienced in accounting principles, to conduct a thorough investigation. Consequently, many employers will be able to avoid liability simply because of the Board's lack of expertise and resources.

Fifth, the requirement imposed by the appellate court to file charges with the Board would require that a multiplicity of actions be brought by the trust funds. Suits to collect pre-termination delinquencies would be brought before the United States District Court. Post-termination, pre-impasse delinquencies would of necessity be brought before the Board. Congress could not have intended this result when it enacted the MPPAA seeking to insure a quick and inexpensive means for collecting delinquent contributions.

Post-liability suits to collect withdrawal liability would be brought before the United States District Court. Both pre-impasse delinquencies and withdrawal liability cases necessarily decide the issue of when and if impasse was reached. It is conceivable that the Board and the court may reach conflicting results. Although the appellate court in the instant case reasoned that the Board had the particular expertise to decide the perplexing issue as to when impasse was reached, the appellate court ignored the fact that the district court must make the same analysis in determining whether an employer has any withdrawal liability. As the issue is identical, it defies

logic to assert that in the one situation the district court possesses the expertise to resolve the issue, while in a second situation requiring the same analysis, the court does not possess the requisite expertise.

## CONCLUSION

The decision of the court below limiting the bringing of an action to collect post-termination, pre-impasse fringe benefit contribution delinquencies to the Board (to the exclusion of the federal district courts) creates insurmountable obstacles preventing the trustees of multiemployer trust funds from the performance of their fiduciary duties. Additionally, the ruling below reaches a result which defies logic and opens the floodgates of litigation by demanding the needless filing of a multiplicity of actions in various forums to redress related wrongs. For the foregoing reasons, the Judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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## **PROOF OF SERVICE BY MAIL**

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On April 9, 1987, I served the within Brief of Amicus Curiae in re: "Laborers Health and Welfare Trust Fund for Northern California vs Advanced Lightweight Concrete Co., Inc." in the United States Supreme Court, October Term 1985, No. 85-2079;

on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

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All Parties required to be served have been served.



I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on April 9, 1987, at Los Angeles, California

Ce Ce Medina  
CE CE MEDINA

No. 85-2079

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Supreme Court, U.S.  
**E I L E D**

MAY 7 1987

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,  
*Petitioners*,

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent*.

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

**BRIEF OF PETITIONERS**

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May 1987

## **QUESTION PRESENTED**

Whether a federal district court has jurisdiction under Sections 502 and 515 of the Employee Retirement Income Security Act, as amended, 29 U.S.C. §§ 1132 and 1145, over an action in which the trustees of multiemployer employee benefit plans, in the exercise of their fiduciary duties, seek to compel an employer to continue making fringe benefit contributions pursuant to the terms of an expired collective bargaining agreement as long as the employer has a duty under applicable labor-management relations law to make such contributions.

### **LIST OF PARTIES**

The parties to the proceedings below and before this Court are:

1. Laborers Health and Welfare Trust Fund for Northern California, Laborers Vacation-Holiday Trust Fund for Northern California, Laborers Pension Trust Fund for Northern California, and Laborers Training and Retraining Trust Fund for Northern California;
2. Cement Masons Health and Welfare Trust Fund for Northern California, Cement Masons Vacation Trust Fund for Northern California, Cement Masons Pension Trust Fund for Northern California, and Cement Masons Apprenticeship and Training Trust Fund for Northern California; and
3. Advanced Lightweight Concrete Co., Inc.

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IN THE  
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LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,  
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ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

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**BRIEF OF PETITIONERS**

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**OPINIONS BELOW**

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A) is reported at 779 F.2d 497. That Court's order denying Petitioners' petition for rehearing and rejecting Petitioners' suggestion for rehearing *en banc* (Pet. App. C) was filed on March 18, 1986. The order of the United States District Court for the Northern District of California (Pet. App. B) was filed on July 30, 1984, and entered on July 31, 1984, and is not reported.<sup>1</sup>

**JURISDICTION**

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on December 26, 1985. A timely petition for rehearing and sug-

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<sup>1</sup> Appendices A, B and C are attached to the petition for a writ of certiorari.

gestion for rehearing *en banc* was filed on January 9, 1986. On March 18, 1986, the petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected. The petition for a writ of certiorari was filed on June 16, 1986, and was granted on February 23, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **STATUTES INVOLVED**

The relevant statutory provisions are:

- A. National Labor Relations Act, as amended, Sections 7 and 8, 29 U.S.C. §§ 157 and 158.
- B. Labor Management Relations Act of 1947, as amended, Sections 301, 302 and 303, 29 U.S.C. §§ 185, 186 and 187.
- C. Employee Retirement Income Security Act of 1974, as amended, Sections 502, 515, 4201, 4203, 4212, 4221 and 4301, 29 U.S.C. §§ 1132, 1145, 1381, 1383, 1392, 1401 and 1451.
- D. Multiemployer Pension Plan Amendments Act of 1980, Sections 3, 306 and 104(2), 29 U.S.C. §§ 1001a, 1132(b)(2), 1132(g)(2), 1145 and 1381-1452.

Pertinent portions of these statutory provisions are reproduced at Appendix D to the petition for a writ of certiorari.

### **STATEMENT OF THE CASE**

Petitioners (hereinafter "Trust Funds") are eight multiemployer employee benefit plans established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 186(c)(5). Four of the Trust Funds were created by a collective bargaining agreement and trust agreements between the Northern California District Council of Laborers (hereinafter "Union") and the Associated General Contractors of California, Inc. (hereinafter "AGC"), a multiemployer association representing

construction industry employers, and the remaining four Trust Funds were created by a collective bargaining agreement and trust agreements between the District Council of Plasterers and Cement Masons of Northern California (hereinafter "Union") and the AGC.

Respondent Advanced Lightweight Concrete Co., Inc. (hereinafter "Advanced Lightweight" or "Employer") is a construction industry employer which, prior to 1983, was a member of the AGC and was signatory to the collective bargaining agreements between AGC and the Unions. Those agreements incorporated by reference the terms of the trust agreements and required the signatory employers to contribute a fixed amount per employee-hour worked to the various Trust Funds.

Prior to the expiration of the collective bargaining agreements, Advanced Lightweight withdrew the AGC's authority to bargain on its behalf and offered to bargain with the Unions as an individual employer. On June 15, 1983, upon the expiration of the collective bargaining agreements, Advanced Lightweight ceased contributing to the Trust Funds.

In December 1983, the Trust Funds filed separate suits against Advanced Lightweight, under Section 502 of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA"), 29 U.S.C. § 1132, seeking unpaid contributions from June 15, 1983. The complaints alleged that Advanced Lightweight was obligated to continue to adhere to the terms of its collective bargaining agreements. The complaints further alleged that Advanced Lightweight had violated this obligation by ceasing to make contributions to the Trust Funds immediately upon the expiration of the collective bargaining agreements. These violations, the complaints claimed, constituted violations of Section 515 of ERISA, 29 U.S.C. § 1145, which provides in pertinent part that an employer "who is obligated to make contributions to a multiem-

ployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of such plan or such agreement." Section 515 was added to ERISA by the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208.

Advanced Lightweight moved for summary judgment on two principal grounds: first, that Section 515 of ERISA requires employers to comply with their *contractual* obligations to make contributions to multiemployer plans but does not require employers to comply with their *other* legal obligations to contribute, such as those based on Section 8(a)(5) of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. § 158(a)(5); and, second, that even if Section 515 is not so limited, the Trust Funds' cause of action falls within the exclusive primary jurisdiction of the National Labor Relations Board (hereinafter "NLRB").<sup>2</sup> The District Court granted Advanced Lightweight's motion for summary judgment and the Ninth Circuit affirmed.

On February 23, 1987, this Court granted the petition for a writ of certiorari to enable the Court to review the Ninth Circuit's decision.<sup>3</sup>

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<sup>2</sup> Advanced Lightweight also claimed, in seeking summary judgment, that in fact a bargaining impasse had been reached as of the time it ceased making contributions. The Trust Funds responded to this contention by submitting declarations denying the existence of an impasse. Given the existence of this disputed issue of fact, summary judgment could not have been granted on this basis, and the Ninth Circuit's opinion affirming the District Court's one-sentence order granting summary judgment treats this case as raising only the legal issues stated in the text.

<sup>3</sup> The First, Third and Fifth Circuits have all reached the same result in similar cases. *New Bedford Fishermen's Welfare Fund v. Baltic Enterprises, Inc.*, 813 F.2d 503 (1st Cir. 1987); *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3d

## SUMMARY OF ARGUMENT

ERISA is a "comprehensive and reticulated" statute designed to protect employee benefits and provide for the financial stability of private employee benefit plans, including multiemployer plans. *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). ERISA imposes various obligations on employers to pay contributions that they had agreed to pay and on fiduciaries who assumed responsibility for paying the benefits and administering the plans. The declared policy of ERISA is to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts" in order to enforce the duties created by ERISA. ERISA § 2(b), 29 U.S.C. § 1001(b). In 1980, and for several years prior thereto, Congress was concerned with maintaining the financial stability of multiemployer plans, which were in decline due in large measure to the failure of employers to make proper and timely contributions to such plans. See, e.g., MPPAA § 3, 29 U.S.C. § 1001a; *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 581 n.22 (1985).

Prompted by such concern, Congress enacted Section 306(a) of the MPPAA, which added Section 515 to ERISA, 29 U.S.C. § 1145. Section 515 provides:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

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Cir. 1986), petitions for cert. filed, 55 U.S.L.W. 3127 (U.S. Aug. 11, 1986) (Nos. 86-203 and 86-208); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986), petition for cert. filed, 54 U.S.L.W. 2621 (U.S. Aug. 20, 1986) (No. 86-262).

Additionally, Section 306(b)(2) of the MPPAA added Section 502(g)(2) to ERISA, 29 U.S.C. § 1132(g)(2), in order to provide mandatory awards of interest, attorney's fees, liquidated damages and costs to multiemployer plans which secured judgments enforcing the employers' obligations to make their required contributions.

An examination of the language, history and structure of the MPPAA amendments to ERISA indicates that Congress intended to make NLRA-based contribution obligations independently enforceable in federal court actions under ERISA.

I. A. The language of Section 515 does not, in most cases, pose any interpretative difficulty as most collection actions are brought to enforce an existing collective bargaining agreement. However, situations do exist where the obligation to contribute is not imposed by contract but arises, instead, by operation of law (such as Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5)). The question before this Court is whether or not Section 515 of ERISA imposes a duty on employers to meet these non-contractual legal obligations to contribute. Section 515 is not conclusive as it can be read in opposing ways. One way would limit its application to existing contractual obligations, while the other would extend its application to obligations measured by the terms of the expired contract but otherwise imposed by operation of law. Based on the guidelines established by the Court for choosing among alternative statutory readings, the Trust Funds submit that the latter reading is appropriate as it is *the* reading "which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Commissioner v. Engle*, 464 U.S. 206, 217 (1984).

B. The legislative history of the MPPAA discloses that its purpose was to enhance the financial integrity of

multiemployer plans. *See, e.g., NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981); *Pension Benefit Guaranty Corporation v. R. A. Gray & Company*, 467 U.S. 717 (1984). A central theme of the MPPAA amendments to ERISA was to provide strong enforcement tools for multiemployer plans to use in collecting both delinquent contributions and withdrawal liability. Section 515 of ERISA was added in order to "promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies." 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson); *id.* at 23288 (remarks of Sen. Williams). The ultimate purpose of Section 515, as noted by its floor managers, was to impose "a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans." *Id.*

C. That Congress intended the scope of the Section 515 duty to encompass an employer's obligation to contribute under the NLRA is confirmed by the structure of the MPPAA amendments to ERISA. Both the collection of delinquent contributions and the collection of withdrawal liability were seen by Congress as essential elements in the statutory scheme necessary to protect the financial stability of multiemployer plans. Under the withdrawal liability provisions added by the MPPAA, an employer which "permanently ceases to have an obligation to contribute" under a plan may be liable to the plan for withdrawal liability. ERISA §§ 4201, 4203, 29 U.S.C. §§ 1381, 1383. Section 4212(a) of ERISA, 29 U.S.C. § 1392(a), defines the phrase "obligation to contribute" for purposes of the withdrawal liability sections as an obligation arising "(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law." This definition demonstrates that Congress understood that an employer's obligation to contribute to a plan may be purely contractual ("under one or more

collective bargaining . . . agreements"), but may also be imposed by the NLRA. The language of Section 515 accommodates these two sources of obligation to contribute by including obligations to make contributions "under the terms of a collectively bargained agreement." Another example of the statutory linkage are the MPPAA amendments to ERISA which expressly provide that suits to collect withdrawal liability are to be treated in the same manner as suits to collect delinquent contributions under Section 515. ERISA §§ 4221(d), 4301(b), 29 U.S.C. §§ 1401(d), 1451(b). The effect of these statutory cross-references is to make available the mandatory remedies of Section 502(g)(2) of ERISA. In view of the statutory interconnections, it would be anomalous to read Section 515 as limited to contractual obligations when the obligation to contribute for withdrawal liability purposes plainly includes NLRA-imposed obligations to contribute. Such an interpretation would also disserve the overriding purpose of the MPPAA: to protect the financial integrity of multiemployer plans.

D. If Section 515 were read to apply only to obligations imposed by collective bargaining agreements, the section would be entirely duplicative of Section 301 of the LMRA, 29 U.S.C. § 185, which creates a federal cause of action for the breach of such contracts. The narrow reading, therefore, is foreclosed by the settled rule of statutory construction that a statute not be read in a manner that renders the law meaningless. Thus, Section 515 is best read to impose on employers an ERISA duty to make legally-required, agreed-upon contributions, even if the legal obligation is not itself imposed by contract.

II. A. The NLRA does not preempt Section 515 claims insofar as the claims raise issues under the NLRA or are based on NLRA-created obligations. Whether or not a claim is preempted is a matter of Congressional intent.

*See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). “[W]here there is an independent federal remedy that is consistent with the NLRA,” this Court has generally concluded that “the parties may have a choice of federal remedies.” *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 635 n.17 (1975). *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 179 (1967); *Farmer v. Carpenters*, 430 U.S. 290, 297 n.8 (1977); *Smith v. Evening News Ass’n*, 371 U.S. 195 (1962); *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72 (1982).

B. 1. The NLRA enforcement scheme is designed to facilitate the resolution of labor disputes, not the full and prompt collection of delinquent contributions. NLRB proceedings do not provide trustees with adequate means to fulfill their fiduciary duties of assuring the financial integrity of multiemployer plans. The NLRB operates under a number of jurisdictional and procedural limitations in unfair labor practice proceedings which would severely undermine the efforts of trust funds to collect delinquent contributions: the NLRB may decline to exercise its jurisdiction (*see, e.g.*, 29 U.S.C. § 164(c)(1)); the NLRB will not remedy any conduct occurring more than six months prior to the filing of the unfair labor practice charge (*see* 29 U.S.C. § 160(b)); the investigation of charges, and the issuance and prosecution of unfair labor practice complaints are entirely within the control and virtually unreviewable discretion of the General Counsel of the NLRB (*see, e.g.*, 29 U.S.C. § 153(d); *Vaca v. Sipes*, 336 U.S. 171, 182 (1967); case processing delays and the continuing case backlog at the NLRB will prevent trustees from securing prompt payment of delinquent contributions; the NLRB will not award the reasonable attorneys’ fees, costs, interest on the unpaid contributions and an additional amount equal to the

greater of interest or specified liquidated damages (the so-called mandatory double interest provisions) that would have been awarded by a federal court if a judgment had been entered in the trust funds' favor in an action to enforce Section 515 (*see, e.g.*, 29 U.S.C. § 1132 (g)(2); *David Ashcraft Company, Inc.*, 279 N.L.R.B. No. 94 (1986)); and unilateral settlements in unfair labor practice cases may be entered into by the NLRB and the employer, despite objections by the charging party, which compromise contribution obligations (*see, e.g.*, 29 C.F.R. § 101.9(c)). Yet the trust funds will still remain liable for pension benefits for hours worked by employees for which no contributions were made. *See, e.g.*, *Central Transport*, 472 U.S. at 567 n.7, 579 n.20.

2. Given the emphasis that ERISA places on the trustees' duty to collect delinquent contributions (*see, e.g.*, *id.* at 573, 580), it would be surprising, indeed, if Congress intended to leave trustees at the mercy of the General Counsel of the NLRB in collecting delinquent contributions from employers whose obligation to contribute arises, in part, from the NLRA.

C. 1. Congress expressly provided in the MPPAA that the NLRB is *not* the exclusive forum for determining whether or not an employer has a post-contract expiration obligation under the NLRA to make contributions to a multiemployer pension plan. In withdrawal liability litigation, the federal courts must decide precisely the same issues regarding "impasse" and the date of cessation of the employer's contribution obligation, which the federal courts would be called upon to decide in post-contract expiration contribution collection actions under Section 515. The fact that Congress authorized the courts to adjudicate these NLRA issues in the withdrawal liability context provides persuasive evidence that Congress did not intend the NLRB to be the sole forum for adjudication of collection disputes which raise NLRA issues.

2. Congress expressly withheld from the Secretary of Labor authority to initiate collection actions. *See Central Transport*, 472 U.S. at 578. Congress did so because it concluded that the Department of Labor should not be subjected to pressures to become a collection agency for the recoupment of delinquent contributions. Congress presumably would not have intended the General Counsel of the NLRB to be placed in the same position. Yet, that is precisely the result if trust funds are foreclosed from litigating Section 515 actions which raise NLRA issues.

## **ARGUMENT**

### **Introduction**

ERISA is a "comprehensive and reticulated" statute designed to protect the benefit expectations of participants and beneficiaries of private pension and welfare plans, including multiemployer plans. *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980). ERISA imposes a series of obligations on employers who agree to provide fringe benefits to their employees and on fiduciaries who assume responsibility for paying such benefits. And it is the declared policy of ERISA to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts" in order to enforce the duties created by ERISA. ERISA § 2(b), 29 U.S.C. § 1001(b).

In 1980, as part of the MPPAA, Congress added Section 515 to Title I of ERISA, and thus made it a statutory obligation, under ERISA, for an employer "who is obligated to make contributions to a multiemployer plan . . . under the terms of a collectively bargained agreement . . . to . . . make such contributions in accordance with the terms and conditions of such . . . agreement." The necessary effect of that amendment is to create an ERISA cause of action for breaches of such "obligati[ons] to make contributions," since both prior and sub-

sequent to the MPPAA, Section 502 of ERISA, 29 U.S.C. § 1132, has provided a federal cause of action "to redress . . . violations . . . or to enforce any provisions" of Title I of ERISA. *See* ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). Indeed, as part of the MPPAA, Congress amended Section 502 to establish specific statutory remedies—including liquidated damages, interest, costs and attorneys' fees—which "the court shall award" in any Section 502 action "to enforce section 515 in which a judgment in favor of the plan is awarded." *See* ERISA § 502(g)(2), 29 U.S.C. § 1132(g)(2). This amendment to Section 502 confirms that, as a general matter, a Section 502 action lies to enforce the duty created by Section 515.

In this case, the Trust Funds brought such Section 502 actions, alleging that the Employer had violated Section 515 by ceasing to make contributions. The Complaints rest on the theory that: (i) the Employer had entered into collective bargaining agreements which obligated it to make contributions, on agreed-upon terms, to the Trust Funds; (ii) upon the expiration of those agreements, the Employer remained obligated, by operation of Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), to continue to abide by the terms of the agreements, unless and until the Employer and the Unions reached the point of impasse in bargaining for successor agreements; (iii) the Employer ceased contributing to the Trust Funds prior to that point; and (iv) by failing to make the contributions it was obligated to make, on the terms provided by the expired collective bargaining agreements, the Employer violated its duty under Section 515 of ERISA.

The courts below refused to entertain the Trust Funds' claim on the ground that the contribution obligation the Trust Funds are seeking to enforce is derived from the NLRA. The lower courts' decision poses two distinct, although related questions: first, does the duty imposed

on an employer by Section 515 of ERISA to pay contributions the employer is obligated to make extend to obligations imposed by operation of law; and, second, if so, is a cause of action brought under Section 502 to enforce the Section 515 duty to make NLRA-required contributions preempted by the exclusive primary jurisdiction of the NLRB. We address those two questions *seriatim*.

**I. An Employer Violates Section 515 of ERISA Whenever The Employer Fails To Make A Contribution To A Multiemployer Plan On Agreed-Upon Terms That The Employer Is Legally Obligated To Make.**

A. Section 515 provides in pertinent part as follows:

Every employer who is obligated to make contributions to a multiemployer plan . . . under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of . . . such agreement.

In most cases, this language poses no interpretative difficulty, since most commonly a Section 515 action is brought to secure a contribution required by a collective bargaining agreement, and there is no doubt that an employer who is obligated *by contract* to contribute to a multiemployer plan has a duty under Section 515 to abide by that contractual obligation. However, as the instant case illustrates, cases can arise in which the obligation to make the contributions is defined and measured by the "terms of a collectively bargained agreement," but in which said obligation is not imposed by contract but arises, instead, by operation of law. For example, as in this case, Section 8(a)(5) of the NLRA may require an employer to make agreed-upon contributions which are defined and measured by the terms of an expired collective bargaining agreement.<sup>4</sup> In such situations, the ques-

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<sup>4</sup> See generally *American Distributing Company, Inc. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984) (emphasis added) (under the NLRA, "an employer is required to maintain the status quo and make payments in conformity with

tion arises: does Section 515 impose a duty upon employers to meet these non-contractual legal obligations to contribute.

The language of Section 515 is not conclusive in answering that question, for the section can be read in opposing ways. On the one hand, the operative phrase—"employer who is obligated to make contributions . . . under the terms of a collectively bargained agreement"—can be read to refer only to employers whose obligation to contribute is established by a collective bargaining agreement and the law of contracts. So read, Section 515 would merely create an ERISA duty on employers to comply with their collective bargaining agreements.

Alternatively, the operative Section 515 language can be read to refer to employers whose contributions are *defined and measured by the terms* of a collective bargaining agreement, but whose obligation to contribute exists as a matter of law, independent of the contract. So read, Section 515 would require employers to adhere to all legal duties to make contributions to collectively-bargained plans.

As this Court has recently reminded, where statutory language is susceptible to alternative interpretations, the Court will adopt that reading "which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *Commissioner v. Engle*, 464 U.S. 206, 217 (1984). As we proceed to show,

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*the terms of an expired written agreement"); Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970) (emphasis added) ("Since the status quo is quite obviously defined by reference to the substantive terms of the expired contract, it follows that, in a limited and special sense, those pertinent contractual terms 'survive' the expiration date"). Cf. *Walsh v. Schlecht*, 429 U.S. 401, 410-11 (1977) (emphasis added) (requiring "petitioner to make contributions measured by the hours worked by his subcontractor's employees" is not violative of Section 302(c)(5) of LMRA).

that approach compels adoption of the second and broader reading of Section 515.

B. As previously noted, Section 515 was enacted as part of the MPPAA. The purpose of that Act, this Court has explained, was "to strengthen the funding requirements and enhance the financial stability of multiemployer pension plans." *NLRB v. Amax Coal Co.*, 453 U.S. 322, 338 n.22 (1981). "In these amendments, Congress sought to foster 'the maintenance and growth of multiemployer pension plans . . .'" *Id.* (quoting MPPAA § 3(c)(2), 29 U.S.C. § 1001a(c)(2)). See generally *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717 (1984); *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. \_\_\_, 89 L.Ed.2d 166 (1986). Congress recognized that the financial instability of multiemployer plans was attributable in substantial part to the failure of employers to make full and timely contributions to such plans. See *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 581 n.22 (1985). See generally *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 86-88 (1982). In enacting the MPPAA, Congress concluded that the existing law was insufficient to deal with the delinquencies of employers in making contributions owed to multiemployer plans.<sup>5</sup>

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<sup>5</sup> At least as early as 1977—three years after the enactment of ERISA—Congress was informed that delinquencies were among “[t]he most significant, and the oldest, day-to-day problem[s] faced by multiemployer plans.” *Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 391 (1977) (testimony of Theodore Groom). In 1978, following these oversight hearings, Senators Williams and Javits, the chairman and ranking minority member of the Senate Human Resources Committee, introduced a bill, The ERISA Improvements Act of 1978, which contained the precursor to Section 515. See S. 3017, § 262, 95th Cong., 2d Sess. (1978).

At the start of the following Congress—the Congress that eventually enacted the MPPAA—Senators Williams and Javits reintro-

The version of the MPPAA initially passed by the House in 1980 attempted to address the problem of delinquent contributions by amending Section 502 to authorize a court to award attorney's fees and liquidated damages (in an amount up to 20% of the delinquency) in actions to recover delinquent contributions. *See H.R. Rep. No. 869 (Part II), 96th Cong., 2d Sess. 48-49, 89 (1980); 126 Cong. Rec. 12233-34 (1980).* The Senate accepted, and strengthened, these remedial provisions—making liquidated damages and attorney's fees mandatory, rather than discretionary, in successful actions for delinquent contributions. *See 126 Cong. Rec. 20172, 20247 (1980).* At the same time, the Senate added Section 515 to ERISA to establish an explicit ERISA duty on employers to comply with their obligations to contribute to multiemployer plans. *Id.*

In adding Section 515 to the bill, the Senate Committee on Labor and Human Resources stated that "[t]he intent

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duced their "ERISA Improvements Act" which, like the prior year's bill, contained the language ultimately enacted as Section 515. *See S. 209, § 154, 96th Cong., 1st Sess. (1979).* In introducing that bill, Senator Javits explained that this section imposes a "new statutory duty [which] will particularly help multiemployer plans collect delinquent employer contributions." *ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess. 106 (1979).*

The Williams-Javits bill (S. 209) was approved by the Senate Committee on Labor and Human Resources in 1979; in so doing, the Committee stated that delinquencies were "a problem encountered at one time or another by virtually every multiple employer plan," that the "importance of timely receipt of previously agreed upon periodic contributions to a collectively bargained multiple employer plan is great," and that therefore "the collectively bargained obligation of an employer to contribute to such a plan merits special treatment under ERISA." Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess., S. 209, The ERISA Improvements Act of 1979: Summary and Analysis of Consideration 45 (Comm. Print 1979).

No final action was taken on the Williams-Javits bill (S. 209) by the Senate; it was superseded by the bill that became the MPPAA.

of this section is to promote the prompt payment of contributions." Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980) (hereinafter "1980 Comm. Print").<sup>6</sup> The Committee explained the need for the provision as follows:

Delinquencies of employers in making required contributions are a serious problem for most multi-employer plans. Failure of employers to make promised contributions in a timely fashion imposes a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.

These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans as well as employers who honor their obligation to contribute in a timely fashion bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.

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<sup>6</sup> Because the MPPAA bill was jointly referred to the Labor and Human Resources Committee and the Finance Committee, neither Committee was permitted under the Senate's rules to issue a committee report. The "Summary and Analysis of Consideration" quoted in the text was prepared by the committee staff in lieu of a report "in the belief that it will be helpful to the Committee on Finance and others in their consideration of the 'Multiemployer Pension Plan Amendments Act of 1980.'" 1980 Comm. Print iii.

Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. [*Id.* at 43-44.]

On the floor of the Senate, Senator Williams, Chairman of the Senate Committee on Labor and Human Resources and the floor manager of the bill, summarized the effect of Section 515 more briefly, stating: "the bill provides a direct and I suggest unambiguous cause of action under ERISA to a plan against a delinquent employer." 126 Cong. Rec. 20180 (1980).

Following relatively brief debate, the Senate approved the MPPAA bill that had been submitted jointly by the Committees on Finance and on Labor and Human Resources (*id.* at 20247), and that bill was returned to the House for its consideration. Representative Thompson, Chairman of the House Education and Labor Committee, urged the House to accept the Senate's proposed Section 515 and the proposed amendments to Section 502. In agreement with the Senate Labor and Human Resources Committee, Representative Thompson argued that delinquencies were "a serious problem for many multiemployer plans," a problem that was causing "lower benefits and higher contribution rates" for multiemployer plans. 126 Cong. Rec. 23039 (1980). Representative Thompson further contended that "[r]ecourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly." *Id.* And Representative Thompson explained the point of Section 515 quite simply—to "provid[e] a direct, unambiguous ERISA cause of action to a plan against a delinquent employer"—adding:

The public policy of this legislation to foster the preservation of the private multiemployer plan sys-

tem necessitates that provision be made to discourage delinquencies and simplify delinquency collection. *The bill imposes a Federal statutory duty to contribute on employers that are already obligated to make contributions to multiemployer plans.* A plan sponsor that prevails in any action to collect delinquent contributions will be entitled to recover the delinquent contributions, court costs, attorney's fees, interest on the contributions owed and liquidated damages. *The intent of this section is to promote the prompt payment of contributions and assist plans in recovering the costs incurred in connection with delinquencies.* [Id. (emphasis added).] <sup>7</sup>

Although Congress' attention in enacting Section 515 was directed most immediately at employers who defaulted on promises to make contributions, it makes little sense, given the broad, remedial purposes underlying Section 515, to read Section 515 restrictively so as to require employers only to comply with their contract, but not to comply with their other legal obligations to contribute based on the terms of the contract. Such a reading would mean that some delinquencies constitute violations of Section 515—and thus some delinquent contributions could be collected through Section 515 (and Section 502)—whereas other delinquencies would not violate Section 515 and would not be recoverable under Section 502. This interpretation would, therefore, fail to achieve the most fundamental aim of Section 515: to provide a “direct, unambiguous ERISA cause of action to a plan against a delinquent employer.” Thus, the interpretation of Section 515 that is “most harmonious

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<sup>7</sup> Although the House approved the Senate's proposed Section 515, the House made other changes in the Senate bill which required resubmission of the bill to the Senate. During the course of the Senate's debates, Senator Williams explained the purposes of Section 515 in terms almost identical to those used by Representative Thompson and quoted in the text. See 126 Cong. Rec. 23288-89 (1980).

with . . . the general purposes that Congress manifested" is that Section 515 creates an ERISA duty on employers to comply with *all* their legal obligations with respect to the payment of agreed-upon contributions to multiemployer plans and that an employer who is delinquent with respect to *any* legally required contributions violates Section 515.

C. That Congress intended the scope of the Section 515 duty to encompass an employer's obligation to contribute under the NLRA is confirmed by the structure of ERISA and, more particularly, of the MPPAA amendments, of which Section 515 was a part.

In addition to the problems created by delinquent employers, Congress found that the stability of multiemployer plans was being threatened by the withdrawal of contributing employers.<sup>8</sup> See *Pension Benefit Guaranty Corporation v. R.A. Gray & Company*, 467 U.S. 717 (1984). To address this concern, the MPPAA added to ERISA a new subtitle (Sections 4201-4303, 29 U.S.C. §§ 1381-1453) pursuant to which, *inter alia*, an employer which "permanently ceases to have an obligation to contribute under [a] plan" may be liable to the plan for withdrawal liability. ERISA §§ 4201, 4203, 29 U.S.C. §§ 1381, 1383.

Congress viewed the collection of delinquent contributions and the collection of employer withdrawal liability

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<sup>8</sup> Congress found that "withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations . . ." MPPAA § 3(a)(4)(A), 29 U.S.C. § 1001a(a)(4)(A). Like the collection of delinquent contributions, the collection of withdrawal liability from employers was considered by Congress to be "central to this legislation." 126 Cong. Rec. 20180 (1980) (colloquy between Sen. Williams and Sen. Matsunaga). See *id.* at 23039 (remarks of Rep. Thompson); 1980 Comm. Print 1. See generally H.R. Rep. No. 869 (Part I), 96th Cong., 2d Sess. (1980).

as essentially the same issue for plans. *See* 126 Cong. Rec. 20180 (colloquy between Sen. Williams and Sen. Matsunaga). Indeed, this linkage is reflected in the statutory language. Section 4301(b) of ERISA, 29 U.S.C. § 1451(b), provides that “[i]n any action under this section to compel an employer to pay withdrawal liability, any failure of the employer to make any withdrawal liability payment within the time prescribed shall be treated in the same manner as a delinquent contribution (within the meaning of section 515).” *See also* ERISA § 4221(d), 29 U.S.C. § 1401(d) (if an employer fails to make a timely withdrawal liability payment in accordance with an arbitrator’s decision, “the employer shall be treated as being delinquent in the making of a contribution required under the plan (within the meaning of section 515)”). The effect of these statutory cross-references is to make available the mandatory remedies of Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), to actions to collect withdrawal liability in addition to actions to collect delinquent contributions.

Given this statutory linkage, it is appropriate and instructive in gleaning the intended scope of the Section 515 duty to examine how Congress defined the obligation to contribute for withdrawal liability purposes. Section 4212(a) of ERISA, 29 U.S.C. § 1392(a), provides:

For purposes of this part, the term “obligation to contribute” means an obligation to contribute arising--

- (1) under one or more collective bargaining (or related) agreements, or
- (2) as a result of a duty under applicable labor-management relations law, but

*does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.* [Emphasis added.]

This definition demonstrates that Congress understood that an employer's obligation to contribute to a plan may be purely contractual ("under one or more collective bargaining . . . agreements"), but may also be imposed by the NLRA. The language of Section 515 accommodates these two sources of obligation to contribute by including obligations to make contributions "*under the terms of a collectively bargained agreement.*" (Emphasis added.)<sup>9</sup>

In view of the statutory design connecting Section 515 and the withdrawal liability provisions, it would be anomalous to read the former as limited to contractual obligations while the latter plainly includes NLRA-imposed obligations to contribute.<sup>10</sup> Indeed, if Section 515

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<sup>9</sup> In this regard, it is significant to note that the first half of the definition of the "obligation to contribute" for withdrawal liability purposes uses language that unmistakably refers only to contractual obligations, as that part of the definition is limited to obligations "arising under one or more collective bargaining agreements." In contrast, Section 515 does not apply only to an "employer who is obligated to make contributions . . . under collective bargaining agreements"; rather, Section 515, in terms, is applicable to employers who are "obligated to make contributions . . . *under the terms of a collectively bargained agreement.*" (Emphasis added.)

If Section 515 were interpreted to be limited to contractual obligations, the underscored phrase ("under the terms of") would be surplusage, which could have been eliminated for Section 515 just as it was in the definitional section of the withdrawal liability provisions as quoted in the text. Reading Section 515 to apply both to contractual obligations and also to legal obligations *which are defined and measured by the terms of a collective bargaining agreement* gives independent meaning to the phrase "under the terms of" in Section 515. See *Marek v. Chesny*, 473 U.S. 1, 9 (1985); authorities cited at n.12, *infra*. This is yet another reason for adopting the broader reading of Section 515.

<sup>10</sup> That Section 4212(a) begins with the phrase "[f]or purposes of this part" does not detract from the helpfulness of this provision in gleaning the Congressional design for Section 515, even though these sections lie in different parts of ERISA, as amended by the MPPAA. Read as a whole, Section 4212(a) excludes from the

were read narrowly to require compliance only with contractual duties, an employer could avoid paying withdrawal liability because of the existence of a *legal* duty to continue contributions, yet still not be under an ERISA duty to make those contributions. Such an interpretation of Section 515 would thus create a significant gap in this "comprehensive and reticulated" law (p. 11, *supra*)—a gap which would undermine the overriding purpose of the MPPAA: to protect the financial integrity of multiemployer plans. Accordingly, the far sounder construction is to read Section 515 to reach employers who are delinquent in contributions they are legally obligated to make (regardless of the source of the obligation) and to read Section 4201 to enable multiemployer plans to secure withdrawal liability from employers who permanently cease to be legally obligated to contribute.

D. There is one final consideration that militates in favor of the broader reading of Section 515. If that sec-

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definition of "obligation to contribute" an obligation to pay delinquent contributions. This exclusion is necessary to prevent employers from evading withdrawal liability by simply remaining delinquent in the payment of contributions and claiming that they remain obligated to contribute and have not withdrawn from the plan.

This exclusion of delinquent contributions from the "obligation to contribute" would make no sense in the context of Section 515, whose very purpose is to assure the collection of such contributions. It only makes sense in the withdrawal liability context; hence, the prefatory limiting phrase is included in Section 4212(a). As the Court noted in *Nachman Corporation v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 370 n.14 (1980), with respect to a definition in Title I of ERISA which was limited by the introductory phrase "For purposes of this title," and which was not expressly incorporated by reference in another Title even though other Title I definitions occasionally were so incorporated: "[t]his specific incorporation suggests that Title I definitions do not apply elsewhere in the Act of their own force, though they may otherwise reflect the meaning of the terms defined as used in other Titles."

tion were read to apply only to obligations imposed by collective bargaining agreements, the section would be entirely duplicative of Section 301 of the LMRA, 29 U.S.C. § 185, which creates a federal cause of action for the breach of such contracts.<sup>11</sup> According to a settled rule of statutory construction, a statute is not to be read in a manner that renders the law meaningless.<sup>12</sup> To avoid such a result here, Section 515 must be understood to extend beyond contractual obligations, and to create a broader duty on employers to abide by any legal obligation to make agreed-upon contributions.<sup>13</sup>

For all these reasons, Section 515 is best read to impose on employers an ERISA duty to make legally-required, agreed-upon contributions, even if the legal obligation is not itself imposed by contract. It follows that, unless the NLRB's exclusive primary jurisdiction doctrine were applicable here, the Trust Funds stated a viable Section 515 claim by alleging that the Employer had failed to make contributions, on agreed-upon terms, at a time when the Employer was obligated by Section 8(a)(5) of the NLRA to continue to adhere to the terms

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<sup>11</sup> Prior to the enactment of ERISA in 1974, federal court jurisdiction of suits to collect delinquent contributions was predicated exclusively on Section 301 of the LMRA. See, e.g., *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960).

<sup>12</sup> See *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) ("the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 n.18 (1978); 2A Sutherland Stat. Const. § 46.06, at 104 (4th ed. 1984) (footnotes omitted) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .").

<sup>13</sup> Reading Section 515 in this fashion is also supported by the legislative history of the MPPAA in which Congress decided not merely to strengthen the then-existing remedies, but rather to create both an explicit statutory duty on employers to comply with their obligations to make contributions to multiemployer plans and mandatory remedies if they failed to do so. See pp. 15-20, *supra*.

of the expired collective bargaining agreements which provided for such contributions.<sup>14</sup>

## **II. The National Labor Relations Act Does Not Preempt A Claim Under Section 502 of ERISA Alleging A Breach of Section 515 of ERISA.**

The remaining question, of course, is whether the Trust Funds' claim falls within the exclusive primary jurisdiction of the NLRB and hence is preempted by the NLRA. As we proceed to show, several considerations compel a negative answer to that question.

A. Whether a claim or cause of action is preempted is, as this Court has repeatedly stressed, a matter of Congressional intent. See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985). Although in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), the Court formulated guidelines for determining when a claim falls within the NLRB's exclusive primary jurisdiction, those guidelines have "never been rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." *Vaca v. Sipes*, 386 U.S. 171, 179 (1967).

In particular, in dealing with federal causes of action created by Congress, this Court has been reluctant to conclude that one federal statute—the NLRA—displaces other federal laws or limits the jurisdiction of the federal courts. Thus, for example, the Court has understood Section 301 of the LMRA to "authorize[] suits for breach of a collective-bargaining agreement even if the breach is an unfair labor practice within the Board's jurisdiction"

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<sup>14</sup> We do not read the Ninth Circuit's decision in this case as necessarily inconsistent with our argument to this point. Although the court below found an absence "of useful statutory or congressional guidance on section 515" (Pet. App. A31), the court also stated that "admittedly the failure to pay may also violate section 515 of ERISA" (*id.* at A33). Thus, the Ninth Circuit at least left open the question of the scope of Section 515.

(*Farmer v. Carpenters*, 430 U.S. 290, 297 n.8 (1977); see *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962)), or even if adjudication of the Section 301 claim requires a determination of whether the agreement violates the NLRA (see *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982)), or whether the union violated the NLRA in its attempt to enforce the agreement (see *Vaca v. Sipes*, *supra*). Similarly, the Court has held that Section 303 of the LMRA, 29 U.S.C. § 187, "authorizes anyone injured in his business or property by activity violative of § 8(b)(4) of the NLRA, . . . 29 U.S.C. § 158(b)(4), to recover damages in federal district court even though the underlying unfair labor practices are remediable by the Board." *Farmer v. Carpenters*, *supra*; see *Teamsters v. Morton*, 377 U.S. 252 (1964). And the Court has sustained the jurisdiction of the federal courts to adjudicate federal antitrust claims that arise out of conduct arguably prohibited by the NLRA. See *Connell Construction Co., Inc. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). In sum, "where there is an independent federal remedy that is consistent with the NLRA," the Court generally has concluded that "the parties may have a choice of federal remedies." *Id.* at 635 n.17.

B. 1. In the instant case, there is no affirmative evidence to suggest that Congress intended to preempt Section 515 claims insofar as the claims raise issues under the NLRA or are based on NLRA-created obligations. To the contrary, as we have seen (pp. 15-20, *supra*), the very point of Section 515 was to address the problem of delinquent contributions in its entirety by creating, under ERISA, a unitary cause of action to enable multiemployer plans to collect delinquent contributions. That purpose would be gravely disserved if trust funds were required to rely solely on the processes of the NLRB to collect delinquent contributions from employers who were obligated, under Section 8(a)(5) of the NLRA, to continue

to adhere to the terms of an expired collective bargaining agreement.<sup>15</sup>

Proceedings before the NLRB are “not to adjudicate private rights but to effectuate” national labor policy. *NLRB v. Industrial Union of Marine and Shipbuilding Workers*, 391 U.S. 418, 424 (1968). See *International Union, United Automobile, Aircraft and Agricultural Implement Workers v. Russell*, 356 U.S. 634, 643 (1958). As the Court explained in *Shepard v. NLRB*, 459 U.S. 344, 351-52 (1983) :

This Court has said that the Board’s “power to order affirmative relief under § 10(c) is merely incidental to the primary purpose of Congress to stop and to prevent unfair labor practices. Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.” *Automobile Workers v. Russell*, 356 U.S. 634, 642-643 (1958).

We find nothing in the language or structure of the [NLRA] that requires the Board to reflexively

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<sup>15</sup> If Section 515 claims based on NLRA-created obligations are preempted, then multiemployer plans will have to file both a federal court action for any pre-contract expiration delinquencies and a separate unfair labor practice charge with the NLRB for post-contract expiration, pre-impasse delinquencies against the same employer covering consecutive periods of time. Preemption of such Section 515 claims would resurrect the very problem that Congress, by enactment of Section 515, sought to eliminate—the “insufficient and unnecessarily cumbersome and costly” “recourse available under current law for collecting delinquent contributions.” P. 18, *supra*. Prior to Section 515’s enactment, the then-available recourse included both federal court actions under Section 301 of the LMRA, 29 U.S.C. § 185, based on a contract and NLRB enforcement proceedings. Consequently, it simply makes no sense to conclude that Congress, after having criticized the then-available remedies, intended to require trustees of multiemployer plans to resort to the NLRB for enforcement of post-contract expiration contribution obligations. Rather, Congress presumably expected that Section 515 would also encompass these obligations.

order that which a complaining party may regard as "complete relief" for every unfair labor practice.

Thus, the NLRA enforcement scheme is designed to facilitate the resolution of labor disputes, not the collection of delinquent contributions.

The NLRB operates under a number of jurisdictional and procedural limitations in unfair labor practice proceedings which would severely undermine the efforts of trust funds to collect delinquent contributions.

*First*, the NLRB may decline to exercise its jurisdiction where, in the opinion of the NLRB, the effect of the labor dispute on commerce "is not sufficiently substantial to warrant the exercise of its jurisdiction. . ." Section 14(c)(1) of the NLRA, 29 U.S.C. § 164(c)(1).<sup>16</sup>

*Second*, the NLRB will not remedy any conduct occurring more than six months prior to the filing of the unfair labor practice charge with the NLRB. See Section 10(b) of the NLRA, 29 U.S.C. § 160(b). By contrast, a federal court action under ERISA to collect delinquent contributions is governed by the most applicable statute of limitations of the forum state since ERISA does not specify one.<sup>17</sup> In California, the statute of limitations for actions for breach of a statutory duty is three years. Cal. Civ. Proc. Code § 338 (Deering 1987). Trust funds rely

<sup>16</sup> For example, the NLRB declines to exercise jurisdiction over non-retail enterprises where the total gross inflow or outflow of goods or services across state lines is less than \$50,000 per annum. See *Siemons Mailing Service*, 122 N.L.R.B. 81 (1958); *Culligan Soft Water Service*, 149 N.L.R.B. 2 (1964).

<sup>17</sup> See, e.g., *Miles v. New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir.), cert. denied, 464 U.S. 829 (1983); *Central States Southeast and Southwest Areas Pension Fund v. Kraftco, Inc.*, 779 F.2d 1098, 1104-07 (6th Cir. 1986); *Jenkins v. Local 705 International Brotherhood of Teamsters Pension Plan*, 713 F.2d 247, 251 (7th Cir. 1983). See also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975).

on the self-reporting of employers or on audits of the employer's payroll and personnel records to determine whether contributions are due. *Central Transport*, 472 U.S. at 562-63. A six-month limitation, while arguably appropriate where the union or employer has or should have first-hand knowledge of the actions constituting an unfair labor practice, would be a profound restriction on trust funds, which ordinarily do not have an ongoing, day-to-day working relationship with the employer.<sup>18</sup>

Third, the investigation of charges, and the issuance and prosecution of unfair labor practice complaints are entirely within the control and discretion of the General Counsel of the NLRB. See 29 U.S.C. § 153(d); 29 C.F.R. §§ 101.2, 101.4. The trustees would have no control over the decision to issue the complaint, or the discovery and other litigation decisions involved.<sup>19</sup> They would, in short, be at the mercy of the General Counsel who, unlike the trustees, has no fiduciary duties under ERISA and whose discretion in exercising its jurisdiction over unfair labor

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<sup>18</sup> Any notion that trustees can rely on unions to enforce an employer's obligations to an employee benefit plan did not survive the Court's decision in *Schneider Moving & Storage Company v. Robbins*, 466 U.S. 364 (1984), and *Central Transport*, where the Court concluded:

[C]ompelling benefit plans to rely on unions would erode the protections ERISA assures to beneficiaries, for the diminishment of trustee responsibility that would result would not necessarily be made up for by the union. ERISA places strict duties on trustees with respect to the interests of beneficiaries, and unions' duties toward beneficiaries are of a quite different scope.

*Central Transport*, 472 U.S. at 575-76.

<sup>19</sup> The NLRB does not allow charging parties or interested third parties to obtain the pretrial discovery accorded parties to judicial proceedings under the Federal Rules of Civil Procedure. See, e.g., II The Developing Labor Law 1625 (C. Morris ed. 1983); NLRB Casehandling Manual (Part One) Unfair Labor Practice Proceedings § 10292.4.

practices is subject to very few limitations.<sup>20</sup> NLRB Chairman Dotson has referred to the NLRB's "heavy workload" and criticized the use of unfair labor practice proceedings to collect delinquent fringe benefit contributions. *Rapid Fur Dressing, Inc.*, 278 N.L.R.B. No. 126 (1986) (Dotson, dissenting). In *CCA Heating & Air Conditioning, Inc.*, 279 N.L.R.B. No. 54 (1986) (Dotson, dissenting), Chairman Dotson emphasized that the NLRB "has a high backlog of undecided cases . . . over 1200 cases are awaiting decision" and that the NLRB "is not a collection agency for the recoupment of delinquent contributions."<sup>21</sup>

*Fourth*, even when the General Counsel of the NLRB decides to prosecute, case processing delays and the continuing case backlog at the NLRB will prevent trust funds from securing prompt payment of delinquent con-

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<sup>20</sup> As the Court explained in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 138-39 (1975) :

Congress has delegated to the Office of General Counsel "on behalf of the Board" the unreviewable authority to determine whether a complaint shall be filed. 29 U.S.C. § 153(d); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). . . . In those cases in which he decides not to issue a complaint, no proceeding before the Board occurs at all. The practical effect of this administrative scheme is that a party believing himself the victim of an unfair labor practice can obtain neither adjudication nor remedy under the labor statute without first persuading the Office of General Counsel that his claim is sufficiently meritorious to warrant Board consideration.

*See, e.g., Vaca v. Sipes*, 386 U.S. 171, 182 (1967) ("the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint").

<sup>21</sup> Some courts have ruled that trustees do not even have standing to invoke the jurisdiction of the NLRB. For example, in *Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc.*, 751 F.2d 1177, 1183 (11th Cir. 1985), the Eleventh Circuit concluded that neither the board of trustees of an employee benefit plan nor the individual trustees had standing to bring an unfair labor practice charge against the employer.

tributions. See Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1795 (1983) (delay of "nearly 1000 days as of 1980" from the filing of an unfair labor practice charge to the receipt of an enforceable order). These delays are so serious that a recent report of a House Committee found that the NLRB "is in a crisis. Delays in decision-making at the Board level and a staggering and debilitating case backlog have resulted in workers being forced to wait years before cases . . . are decided." House Comm. On Government Operations, Delay, Slowness in Decisionmaking, And The Case Backlog At The National Labor Relations Board—Fifty-Ninth Report, H.R. Rep. No. 1141, 98th Cong., 2d Sess. 4 (1984). The time-consuming procedures of the NLRB are not a recent development, even if their magnitude has increased. During the period 1978-1980, when Congress was considering the MPPAA and its precursors, Congress was well aware of such delays.<sup>22</sup> In addition, even when the NLRB decides in the trust funds' favor, the NLRB has no inherent authority to enforce its order and therefore must seek enforcement in a United States court of appeals. See Section 10(e) of the NLRA, 29 U.S.C. § 160(e); II The Developing Labor Law 1695 (C. Morris ed. 1983). Moreover, Section 10(e) does not specify a time limitation for the filing of a petition for enforcement of the NLRB's order. Thus, except for the possible defense of laches, the NLRB may sit on a case for an extended period of time before seeking enforcement in the courts. This procedure, built into the NLRA itself, further delays and frustrates the overall Congressional objective of prompt payment of trust fund obligations.

*Fifth*, even should the trust funds prevail in an unfair labor practice proceeding before the NLRB, they will not

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<sup>22</sup> See *Labor Reform Act of 1977 (Part I): Hearings on H.R. 8410 before the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. (1977).

receive the reasonable attorney's fees, costs, interest on the unpaid contributions, and an additional amount equal to the greater of interest or specified liquidated damages (the so-called mandatory double interest provisions) that Congress, in enacting the MPPAA, *mandated* that trust funds receive when they prevail on a claim for delinquent contributions. See p. 12, *supra*.<sup>23</sup> The NLRB cannot impose any type of punitive sanction. "The regulatory scheme established for labor relations by Congress is 'essentially remedial,' and the [NLRB] is not generally authorized to impose penalties solely for the purpose of deterrence or retribution. *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940)." *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. \_\_\_, 89 L.Ed.2d 223, 229 n.5 (1986). See *Russell*, 356 U.S. at 646 (power to impose punitive sanctions is not within the jurisdiction of the NLRB); *NLRB v. Strong*, 393 U.S. 357, 358 (1969) (NLRB is not authorized to take punitive measures). By contrast, the mandatory double interest provisions which the MPPAA added to ERISA, 29 U.S.C. § 1132(g)(2)(B) and (C), "fulfill most of the usual functions of punitive damages in deterring misconduct and ensuring compliance." *Winterrowd v. David Freedman and Company, Inc.*, 724 F.2d 823, 827 (9th Cir. 1984). In addition, unlike the NLRB, a federal court may, in certain circumstances, award punitive damages in actions to recover

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<sup>23</sup> The NLRB has refused to award interest where an employer failed to pay fringe benefit contributions and where the plans provided for liquidated damages in the event of nonpayment of fringe benefit contributions; the NLRB concluded that there existed a privately agreed-upon substitute for the award of interest on unpaid contributions. See, e.g., *David Ashcraft Company, Inc.*, 279 N.L.R.B. No. 94 (1986); *Scheuner Construction Company*, 266 N.L.R.B. 624, 625 n.4 (1983), *enforce<sub>a</sub> nem.*, 720 F.2d 679 (6th Cir. 1983). These decisions clearly contravene Section 502(g)(2) of ERISA which requires the award of interest in addition to liquidated damages.

unpaid employer contributions under Section 515 of ERISA. *Id.* at 826-27.

Finally, unilateral settlements in unfair labor practice cases may be entered into by the NLRB and the charged party despite objections by the charging party. See 29 C.F.R. § 101.9(c). Such NLRB negotiated settlements may compromise contribution obligations in exchange for employer concessions in other areas. See, e.g., *Mo-Kan Teamsters Pension Fund v. Botsford Ready Mix Co.*, 605 F. Supp. 1441, 1444 (W.D. Mo. 1985) (NLRB settlement, despite objections of the charging party, in an amount equal to 80% of the contributions that should have been paid).<sup>24</sup>

The foregoing makes clear that the NLRB is *not* an adequate avenue of redress for trust funds with respect to the collection of delinquent contributions. In situations where the NLRB, for whatever reason (including reasons unrelated to the merits of the claim), refuses to prosecute, multiemployer employee benefit plans will have *no available forum* in which to collect post-contract expiration contribution delinquencies under the Ninth Circuit's reading of Section 515.<sup>25</sup> And, even where the NLRB decides to prosecute, trust funds may very well *not* receive a settlement or NLRB order in an amount equal to 100% of the contributions that should have been paid. In that event, the trustees' interest in fully collecting all

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<sup>24</sup> According to the NLRB's own data, of the unfair labor practice cases which the NLRB regional offices found to have merit in fiscal year 1983, 85% of these cases were disposed of by formal or informal settlements by the regional offices. See Forty-Eighth Annual Report of the NLRB for the Fiscal Year Ended September 30, 1983, Chart No. 3A at 7 (1986).

<sup>25</sup> Cf. *Vaca v. Sipes*, 386 U.S. 171, 182-83 (1967) ("The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine").

contributions owed to a multiemployer plan would be compromised.<sup>26</sup> Cf. *NLRB v. Amax Coal Company*, 453 U.S. 322, 337 (1981) ("trustees have an obligation to enforce the terms of the collective bargaining agreement regarding employee fund contributions against the employer 'for the sole benefit of the beneficiaries of the fund' ") (emphasis in original; citation omitted). Yet the trust funds will still remain liable for pension benefits for hours worked by employees for which no contributions were made.<sup>27</sup>

2. Granting exclusive jurisdiction to the NLRB to enforce the contribution obligations of employers whose collective bargaining agreements have expired would disserve the policies of ERISA in a second way: such a rule would undermine the responsibility of the trustees of a multiemployer plan to assure full and prompt collection of contributions owed to a plan. See *Central Transport*, 472 U.S. at 573, 580. As this Court has

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<sup>26</sup> The legislative history of the MPPAA indicates that such compromises, which are the foundation of effective labor-management relations, are to be avoided with respect to multiemployer plans because they place the financial burden on the other employers participating in the plan. See 126 Cong. Rec. 23039 (1980) (remarks of Rep. Thompson).

<sup>27</sup> See *Central Transport*, 472 U.S. at 567 n.7, 579 n.20 ("the Labor Department has consistently taken the position that any pension plan document language denying benefits to a participant because of an employer's failure to make required contributions would violate ERISA and would thus be unenforceable . . . At a minimum, this means that [a trust fund] is reasonable in operating . . . under the assumption that it would be liable for pension claims regardless of an employer's failure to make required contributions"); 29 C.F.R. § 2530.200b-2; Department of Labor Advisory Op. No. 78-28A (Dec. 5, 1978); Department of Labor Advisory Op. No. 76-89 (Aug. 31, 1979). Trust funds will also remain liable for other fringe benefits when the applicable trust documents provide for benefits for hours worked by employees regardless of an employer's failure to make the required contributions.

stated, "ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled, so that those funds can be used on behalf of participants and beneficiaries." *Id.* at 571. Indeed, "[t]he Secretary of Labor has explicitly interpreted the trustees' duty to prevent employer use of trust assets as . . . requiring plans to adopt systems for policing employers" as it is the Department's view that "'failing to collect delinquent contributions'" may constitute a "prohibit[ed] extension[] of credit to employers." *Id.* at 573-74. And "the structure of ERISA makes clear that Congress did not intend for government enforcement powers to lessen the responsibilities of plan fiduciaries." *Id.* at 578.

Given the emphasis that ERISA places on the *trustees'* duty to collect delinquent contributions, it would be surprising, indeed, if Congress intended to leave the trustees at the mercy of the General Counsel of the NLRB in collecting contributions from delinquent employers whose obligation to contribute arises, in part, from the NLRA. The far more likely conclusion is that in enacting Section 515 Congress intended to enable the trustees to pursue *all* categories of delinquent employers.

C. Aside from the evidence that the policies underlying Section 515, and ERISA generally, would be diserved if any category of Section 515 claims were relegated to the exclusive jurisdiction of the NLRB, there are two more specific indications in the statutory materials that Congress did not intend to preempt Section 515 claims brought to enforce NLRA-based obligations.

1. At the same time that Congress enacted Section 515, it enacted another statutory obligation whose enforcement, in terms, requires courts to adjudicate the precise NLRA issues that are implicated by the Trust Funds' claim in the instant case. We refer to the MPPAA provisions establishing withdrawal liability, which provisions, as we previously noted, impose such

liability only on an employer whose "obligation to contribute" to a plan either "under one or more collective bargaining agreements, or as a result of a duty under applicable labor-management relations law" has ceased. ERISA § 4212(a), 29 U.S.C. § 1392(a). See p. 21, *supra*.

Under these sections, in order to determine whether an employer has "withdrawn" and thus owes "withdrawal liability," it is necessary to decide whether the employer continues to have a contribution obligation "under applicable labor-management relations law." The arbitrator or court must decide the very NLRA issue posed here: whether the employer had reached the point of impasse in bargaining for a successor contract—in which case the employer no longer is obligated to abide by the terms of the expired contract and may be subject to withdrawal liability—or whether bargaining has not yet become "fruitless" (*NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 533 (1984)), in which case the terms of the contract must still be honored and no withdrawal liability can be imposed. See F. ISA §§ 4221, 4301, 29 U.S.C. §§ 1401, 1451; 1980 Comm. Print 12-14; H.R. Rep. No. 869 (Part II), 96th Cong., 2d Sess. 16 (1980); *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691, 695 (9th Cir. 1986) (remanding for ruling on whether or not an "impasse" in negotiations had been reached either before or after the effective date of the MPPAA withdrawal liability provisions); *I.A.M. National Pension Fund v. Schulze Tool and Die Co., Inc.*, 564 F. Supp. 1285, 1294 n.4 (N.D. Cal. 1983) (court must resolve "impasse" issue in making withdrawal liability determination).<sup>28</sup>

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<sup>28</sup> This "intricate relationship" between withdrawal liability and post-contract expiration contribution obligations is an "intensely practical consideration[] which foreclose[s] pre-emption of judicial cognizance of" post-contract expiration contribution collection actions under Section 615. *Vaca*, 386 U.S. at 183 ("There are some

The fact that Congress authorized the courts to adjudicate this issue in the withdrawal liability context provides persuasive evidence that Congress did not view such adjudication as unduly trenching upon the policies of the NLRA or the prerogatives of the NLRB. And it makes no sense to conclude that Congress desired to preempt actions to enforce Section 515 obligations where such actions raise NLRA questions when Congress authorized the courts to decide these very NLRA issues in the withdrawal liability context.

The instant case illustrates the point well. When Advanced Lightweight withdrew from the multiemployer bargaining association (the AGC) and ceased making contributions to all of the Trust Funds created by the collective bargaining agreements and the trust agreements between the AGC and the Unions, the Trust Funds had two options: they could have sued for withdrawal liability (on the theory that Advanced Lightweight had permanently ceased to have an obligation to contribute to the Trust Funds) or they could have sued for delinquent contributions. Had the Trust Funds brought the former suit, the courts would have been *required* to examine the course of bargaining between Advanced Lightweight and the Unions in order to determine whether the parties were at a permanent impasse so as to permanently relieve Advanced Lightweight of its obligation to make contributions to the Trust Funds and thereby trigger withdrawal liability. Given that fact, there is no sound reason to believe that Congress intended to foreclose the very same inquiry in a Section 515 suit merely

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intensely practical considerations which foreclose pre-emption of judicial cognizance of fair representation duty suits, considerations which emerge from the intricate relationship between the duty of fair representation and the enforcement of collective bargaining contracts. For the fact is that the question of whether a union has breached its duty of fair representation will in many cases be a critical issue in a suit under LMRA § 301 charging an employer with a breach of contract").

because the Trust Funds reached the judgment that Advanced Lightweight was still under an obligation to contribute and sued to collect such contributions.

2. There is a second piece of evidence in the MPPAA that leads to the conclusion that Congress did not intend to give the NLRB exclusive authority to press and resolve claims for delinquent contributions from an employer whose agreement has expired. As this Court recently noted, "neither the structure of [ERISA] nor the legislative history shows any congressional intent that plans should rely primarily on centralized federal monitoring of employer contribution requirements. Indeed, [in enacting the MPPAA,] Congress expressly withheld from the Secretary [of Labor] the authority to initiate actions to enforce an employer's contribution obligations." *Central Transport*, 472 U.S. at 578 (citing ERISA § 502(b)(2), 29 U.S.C. § 1132(b)(2) (as added by MPPAA § 306(b)(1))). Congress did so because it concluded that "the Labor Department should not be subjected to pressures which might cause it to routinely institute collection litigation on behalf of plans against delinquent employers." Staff of Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess., S. 209, The ERISA Improvements Act of 1979: Summary and Analysis of Consideration 46 (Comm. Print 1979).<sup>29</sup>

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<sup>29</sup> As discussed at n.5, *supra*, Senators Williams and Javits introduced S. 209 at the start of the Congress that eventually enacted the MPPAA. S. 209 included a provision (Section 153) prohibiting the Secretary of Labor from initiating suits under a section virtually identical to Section 515 of ERISA. See *ERISA Improvements Act of 1979: Hearings on S. 209 Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 36, 42 (1979). There appears to be no explanation of Section 502(b)(2) of ERISA in the legislative history of the MPPAA. Since S. 209 and the MPPAA were introduced in the same Congress and S. 209 contains language virtually identical to Sections 502(b)(2) and 515, the explanation of the S. 209 precursor to Section 502(b)(2) should provide insight concerning Congressional intent with respect to the latter.

If the Trust Funds' claim were held to be preempted here, the General Counsel of the NLRB would have not merely the power but the *exclusive authority* to collect delinquent contributions from employers whose agreements have expired. See p. 29, *supra*. The General Counsel would thus be subject to the very "pressures . . . to . . . institute collection litigation" from which Congress sought to insulate the Secretary of Labor. There is every reason to assume that Congress would not have intended such a result and thus would not have intended to deny multiemployer plans the power to pursue contributions from delinquent employers whose agreements have expired but whose obligation to contribute continues.

D. In reaching its contrary conclusion, the court below dismissed the legislative materials pertaining to the enactment of Section 515 on the ground that there is no "indication that Congress was aware of the potential for conflict between § 515 and §§ 7 and 8 of the NLRA." Pet. App. A27 n.12. The court reasoned that "[t]he lack of useful statutory or Congressional guidance on section 515 requires that the matter be decided by the application of accepted labor law principles." *Id.* at A31. And applying the *Garmon* guidelines mechanically, the court easily concluded that the Trust Funds' claim was preempted. The court's analysis is doubly flawed.

First, as we have seen (pp. 25-26, *supra*), the *Garmon* guidelines are not to be "rigidly applied to cases where it could not fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB." P. 25, *supra*. This is especially true where *Garmon* is invoked to preempt an independent *federal* remedy. Thus, the relevant question here is not whether there is "persuasive evidence . . . that Congress intended section 515 to be an exception to the general rule of NLRB preemption" (Pet. App. A36-A37), but rather whether it can "fairly be inferred that Congress intended exclusive jurisdiction to lie with the NLRB."

Second, as we also have seen, no matter how the question is framed, the statutory structure and policies compel the conclusion that Congress could not have intended to preempt suits to enforce Section 515 against delinquent employers whose obligation to continue contributing on agreed-upon terms is derived from the NLRA. Preempting such suits would undermine the principal purpose of Section 515, and of the MPPAA generally: protecting the financial integrity of multiemployer plans. Preemption would compromise the trustees' role as collector of contributions, and would place a governmental officer in the position of collection agent. Yet preemption would not advance any NLRA policy, since the very NLRA issues that would be removed from judicial consideration by the preemption of Section 515 claims would nonetheless end up in federal court in claims for withdrawal liability.

### CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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May 1987

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No. 85-2079

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**

October Term, 1986

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**LABORERS HEALTH AND WELFARE TRUST  
FUND FOR NORTHERN CALIFORNIA, et al.,**

*Petitioners,*

v.

**ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,**  
*Respondent.*

—0—  
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**QUESTION PRESENTED**

Whether a claim that an employer has failed to contribute to a multiemployer trust fund for periods after the expiration of a collective bargaining agreement, in alleged violation of the employer's duty to maintain the status quo under Section 8(a)(5) of the National Labor Relations Act, is actionable under Section 515 of the Employee Retirement Income Security Act, despite the exclusive jurisdiction of the National Labor Relations Board over alleged violations of the NLRA.

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## **STATEMENT OF THE CASE**

Petitioners, hereinafter referred to as "the Funds," are multiemployer employee benefit plans established pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended, (LMRA) 29 U.S.C. 156 et seq. Prior to June 15, 1983, Respondent, hereinafter referred to as "the Employer" or "Advanced Lightweight", made contributions to the Funds pursuant to collective bargaining agreements it had with the District Council of Plasterers and Cement Masons of Northern California and the Northern California District Council of Laborers, hereinafter referred to as "Unions". These agreements incorporated the terms of the Funds' trust agreements by reference and specified a contribution rate to be paid monthly by the Employer during the term of the agreement. The Employer made all required contributions to the Funds through June 15, 1983, when the collective bargaining agreements expired.

On April 1, 1983, the Employer advised both Unions that it would not be bound by any extensions or renewals of the 1980-83 agreement and declared its readiness to negotiate. Notwithstanding this invitation, neither Union made any attempt to commence collective bargaining negotiations with the Employer. At no time since June 15, 1983, has Advanced Lightweight been party to a collective bargaining agreement with either Union.<sup>1</sup>

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<sup>1</sup> The manner and extent to which the two Unions availed themselves of Advanced Lightweight's bargaining invitation is in dispute. The Funds claim that no bargaining impasse was reached between Advanced Lightweight and the two Unions. Advanced Lightweight, on the other hand, asserts the existence of a bargaining impasse. Alternatively, even in the absence of a bargaining impasse, Advanced Lightweight contends that the

(Continued on following page)

On December 16, 1983, the Funds filed separate suits against the Employer seeking delinquent trust fund contributions alleged to be due for the period following the agreements' expiration. In both actions, the Funds alleged that the Employer was bound under Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5), to continue contributions after June 15, 1983 and that the actions arose under and were brought pursuant to Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. 185 and Section 502 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. 1132.

In January 1984, the Employer answered the Funds' Complaints and alleged that the district court lacked subject matter jurisdiction over the Funds' claims. It also asserted that its negotiations with the Unions were at "impasse" and that it therefore had no contribution obligation.

Advanced Lightweight then moved for summary judgment on two principal grounds: first, that neither LMRA Section 301 nor ERISA Section 515 requires employers to comply with their legal obligations based on Section 8(a)(5) of the NLRA, 29 U.S.C. 158(a)(5); and second, that

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Unions either did not assert their bargaining rights in a timely fashion and thereby waived them, or failed to satisfy their obligation to bargain in good faith with Advanced Lightweight with respect to wages, hours and other terms and conditions of employment. Advanced Lightweight contends that in either event it satisfied its duty to bargain under Section 8(a)(5) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(a)(5), and that it was free to make unilateral changes in working conditions, i.e., the cessation of contributions to the Funds after the expiration of the Unions' contracts.

the Funds' cause of action falls within the exclusive jurisdiction of the National Labor Relations Board (NLRB). The district court granted Advanced Lightweight's motion for summary judgment.

The Ninth Circuit Court of Appeals affirmed on the ground that the district court had no jurisdiction to hear actions based on Section 8(a)(5) of the NLRA under either Section 301 of the LMRA or any section of ERISA. It noted that "an employer's failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining in breach of sections 8(a)(1), 8(a)(5) and 8(d) of the [NLRA]." But, it added, "a collective bargaining agreement does not 'survive' [its expiration] in the sense that it continues as a legally operative document." Rather, the court said, "the agreement's terms 'survive' in order to define the parameters of the employer's obligation under section 8(a)(5) to maintain the status quo during negotiations." Accordingly, the court found that Advanced Lightweight was entitled to "summary judgment on the Funds' section 301 claims."

Turning to the question of the district court's jurisdiction under ERISA Sections 502 and 515,<sup>2</sup> the court found "no persuasive evidence in either the plain words or legis-

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<sup>2</sup> Section 502(e)(1), 29 U.S.C. 1132(e)(1), provides: "[T]he district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary."

Section 515 of ERISA, 29 U.S.C. 1145, provides that:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under

(Continued on following page)

lative history of ERISA \*\*\* that Congress intended section 515 to be an exception to the general rule of NLRB preemption." Accordingly, the court held that "the primary jurisdiction of the [NLRB] preempts the Trust Funds' \*\*\* suit in district court under sections 502 and 515 of [ERISA] to recover delinquent contributions accrued after a collective bargaining agreement has expired."

In June 1986, the Funds petitioned this Court for a writ of certiorari to determine whether district courts had jurisdiction, pursuant to Sections 502 and 515 of ERISA, over actions to collect trust fund contributions which allegedly accrued after the collective bargaining agreement which created the obligation to contribute expired.<sup>3</sup> Thereafter, the Court invited the Solicitor General to comment on whether certiorari should be granted. The Solicitor General recommended that certiorari be granted even though every court of appeal that has considered this issue has joined with the Ninth Circuit. On February 23, 1987, this Court granted the Petition For Writ of Certiorari.

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the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

<sup>3</sup> The Trust Funds did not seek review of the Ninth Circuit's decision concerning Section 301 jurisdiction. Accordingly, the Section 301 portion of the underlying decision is not before the Court.

## SUMMARY OF ARGUMENT

A. 1. The plain wording of the 1980 amendments to ERISA establishes that an employer violates ERISA only when it fails to make contributions to a multiemployer plan under an existing collective bargaining agreement. Section 515 does not provide that an employer violates ERISA when it ceases making contributions after a collective bargaining agreement expires. Those claims fall solely within the exclusive jurisdiction of the National Labor Relations Board under Section 8(a)(5) of the NLRA. If Section 515 were intended to apply to post-contract obligations that may arise by operation of applicable labor-management relations law, it would say so. It does not. Instead, Section 515 merely allows a plan to seek past due contributions and other statutorily-defined damages when an employer breaches its contract.

Other sections of the Multiemployer Pension Plan Amendments Act of 1980, Pub.L. No. 96-364, 94 Stat. 1295 (MPPAA), demonstrate that Congress understood the difference between contractual obligations and duties arising by operation of the NLRA and that it chose to limit the application of Section 515 to the former. Where Congress includes language in one section of a statute but omits it in another section of the same act, it must be presumed that it acted intentionally and purposefully. Common sense and generally accepted principles of statutory construction also require a conclusion that Section 515 was not intended to apply to claims for post-contractual contributions in derogation of the NLRB's exclusive jurisdiction over such claims.

2. Every reference to Section 515 in the legislative history of the 1980 amendments to ERISA speaks in

terms of the employer's contractual obligation to contribute and makes clear that Congress enacted Section 515 for the limited purpose of giving multiemployer plans additional remedies for an employer's breach of that obligation. Nowhere did Congress indicate an intent to invade or encroach upon the NLRB's exclusive jurisdiction over unfair labor practices.

The Funds' claims are grounded solely upon the NLRB's interpretation of Sections 8(a)(5) and 8(d) of the NLRA. Like ERISA, the NLRA is a complex, reticulated statute which gives the NLRB exclusive jurisdiction over unfair labor practices. If Congress had intended to alter this comprehensive scheme, or to erode the Board's exclusive power when it amended ERISA, Congress would have said so. However, it is clear from the legislative history that no such changes or restrictions were intended or even contemplated. Instead, Congress crafted ERISA remedies to apply only to collection actions based upon an employer's breach of its contractual promise to pay.

B. Requiring trust funds to go before the NLRB with claims that arise by operation of the NLRA will neither harm plans nor cause trustees to breach their fiduciary duties. Trust funds are like any other charging party whose claims derive solely from Section 8(a)(5) of the NLRA. They may bring a charge for unfair labor practices and may seek appropriate remedies under the NLRA. A violation of Section 8(a)(5) is a violation of the NLRA and does not entitle funds to the mandatory relief of Section 502 of ERISA. However, the NLRB does have broad remedial powers, and can award appropriate relief, including lost return on investment, administrative costs, liquidated damages and attorney's fees, where the trust funds prevail on their unfair labor practice claims. Trust

funds will not be liable for benefits unsupported by contributions, and trustees will not breach their fiduciary duties if they pursue post-contractual contributions before the NLRB. Rather, they will have done all that the law allows them to do, thereby satisfying their duties as fiduciaries.

C. Any claim for post-contractual contributions is grounded solely upon the employer's duty arising out of the NLRA, as interpreted and applied by the NLRB. It is essential to the continued uniform interpretation and application of federal labor policy that the NLRB, and not the courts, resolve unfair labor practice claims. The preservation of the NLRB's exclusive jurisdiction is especially important here because difficult issues of fact and complex questions of federal labor law are presented. These issues, at least one of which is a federal labor policy question of first impression, require initial Board determination.

ERISA's withdrawal liability sections do not alter this result. Delinquency claims based on Section 8(a)(5) of the NLRA are not analogous to withdrawal liability arising under Section 4302 of ERISA, and allowing district courts to decide unfair labor practices in delinquency actions represents a needless invasion of the NLRB's exclusive jurisdiction. A determination that an employer has withdrawn does not involve a violation of Section 8(a)(5) of the NLRA or authorize an invasion of the NLRB's duty to decide unfair labor practices.

Allowing district courts to hear collection claims based on Section 8(a)(5) will also frustrate the policies and purposes underlying ERISA. Section 515 was added to give trust funds an ERISA-based breach of contract cause of

action where an employer would not be allowed to raise defenses unrelated to its promise to pay. If federal courts hear actions based on unfair labor practices under Section 8(a)(5), all those complex, "extraneous" defenses will be reinjected into collection actions and the purpose of Sections 515 and 502 will be frustrated. Sending Section 8(a)(5) claims to district court will also frustrate ERISA by causing plans to needlessly expend plan assets on complex judicial litigation of uncertain claims. The NLRB is ready and able to efficiently prosecute these claims for free. Thus, allowing trust funds to proceed to court with unfair labor practices may needlessly reduce assets which could otherwise be used to pay benefits.

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## **ARGUMENT**

- A. The Plain Wording Of The 1980 Amendments To ERISA Establishes That An Employer Violates Section 515 Of ERISA Only When It Fails To Make Contributions To A Multiemployer Plan Under An Existing Collective Bargaining Agreement.**
  - 1. Section 515 Of ERISA Means Exactly What It Says—It Is Limited To Claims Arising Out Of Existing Contracts And Does Not Apply To Obligations Arising Solely Under Section 8(a)(5) Of The NLRA.**

Before Section 515 was added to Title I of ERISA in 1980, there was no cause of action under ERISA for delinquent contributions. A multiemployer employee benefit fund that wished to sue an employer for delinquent contributions had only one route to federal court—Section 301 of the Labor Management Relations Act, 29 U.S.C. 185. Under that section, the fund would not be entitled to recover attorney fees or any penalties and would not automatically be entitled to recover prejudgment interest.

In 1980, Congress decided to arm multiemployer plans with an extraordinary weapon in collection actions—mandatory prejudgment interest, mandatory attorney fees and costs, and a mandatory penalty equal to the prejudgment interest (or, if greater, any liquidated damages specified in the plan document, up to 20 percent of the delinquency). These extraordinary remedies were inserted in Section 502(g) of ERISA.

The addition of mandatory remedies to Section 502 still did not authorize a multiemployer fund to sue an employer for delinquent contributions. Accordingly, Congress added Section 515 to make it a requirement of ERISA to pay contractual obligations. With this addition, Congress made it possible for trust funds to sue under Section 502 and to seek mandatory prejudgment interest, attorney fees and liquidated damages. Section 515 provides:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

The key phrase in Section 515 for purposes of this case is “under the terms of a collectively bargained agreement” because it clearly and unambiguously describes the source of the employer’s ERISA obligation: the contractual promise to pay. Since the present case involves an obligation which is not contractual in nature, it falls outside of the scope of Section 515 and outside the jurisdictional grant of Section 502. The Funds, nonetheless, attempt to persuade the Court that the phrase “under the terms of a collectively bargained agreement” was intended to include legal duties imposed by the NLRB’s interpre-

tation of Section 8(a)(5). The Funds' interpretation cannot succeed since on its face, Section 515 makes no reference to legal duties imposed by applicable labor-management relations law and speaks solely in terms of obligations arising out of contract.

As part of the same amendments that added Sections 515 and 502(g), Congress used language that clearly demonstrates that it appreciated the difference between contractual obligations and legal duties arising out of the NLRA and that it chose to limit the application of Section 515 to contractual obligations.<sup>4</sup> In the withdrawal liability sections of MPPAA, Congress drafted Section 4212 to make separate reference to obligations arising by virtue of a collective bargaining agreement and to obligations arising under applicable labor-management relations law. Section 4212 states:

*For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—*

- (1) under one or more collective bargaining (or related) agreements, or
- (2) as a result of a duty under applicable labor-management relations law,

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<sup>4</sup> Sections 502 and 515 were added to ERISA as part of MPPAA. The main focus of MPPAA was employer withdrawal from multiemployer pension plans. Congress felt the preexisting law to be unfair because it typically allowed employers to withdraw from plans without liability for unfunded vested pension benefits and left those employers remaining in the plan liable for a larger proportionate share of those unfunded benefits. Accordingly, MPPAA amended ERISA to require all withdrawing employers to pay their fair share of the Plan's unfunded vested liability. Under MPPAA, a complete withdrawal occurs when an employer permanently ceases having an "obligation to contribute" to a plan. See ERISA, Section 4203(a), 29 U.S.C. 1383(a).

*but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.* (emphasis added)

By identifying both sources of obligation in Section 4212, Congress demonstrated that it appreciated the distinction between them. But Congress drafted this two-pronged definition to apply *only* to determinations of whether an employer has withdrawn from a plan. Nothing in the language of Section 4212 or Section 515 indicates that this definition applies to actions for delinquent contributions. In fact, the plain language of the statute says just the opposite.<sup>5</sup>

Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully in that disparate inclusion or exclusion. *Rodriguez v. United States*, 480 U.S. — (1987) (per curiam) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). This general presumption is particularly weighty in the instant case since Sections 515 and 4212 were enacted as parts of the same legislation and Congress expressly limited Section 4212's application to determinations of if and when a withdrawal occurs.

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<sup>5</sup> Interestingly, if the reference in Section 515 to a collective bargaining agreement were read as incorporating the definition from Section 4212, the Funds would actually be barred from collecting any delinquent contributions. Section 4212 expressly provides that the obligation to contribute "does not include an obligation . . . to pay delinquent contributions." Thus, it is nonsensical to argue that Section 515—intended to enable funds to collect delinquent contributions—incorporates a definition of the obligation to contribute which excludes delinquent contributions.

The limitations built into Section 4212 and the plain language of Section 515 should make it impossible for the court to conclude that the phrase "under the terms of a collective bargaining agreement" in Section 515 includes the separate obligation to contribute "under applicable labor-management relations law." If the language of Section 515 does not include applicable labor-management relations law, the Funds cannot prevail. Necessity being the mother of invention, the Funds nevertheless insist that Congress intended in Section 515 to refer to both prongs of Section 4212. They attempt to achieve that objective by focusing on Section 515's use of the phrase under "the terms of" a collective bargaining agreement and argue that this oblique phrase is a cryptic reference to duties arising under applicable labor-management relations law.<sup>6</sup>

The Funds' reading of Section 515 is unacceptable. Common sense and the plain wording of ERISA tells us that had Congress intended a radical departure from the exclusive jurisdiction of the NLRB it would have said so. Yet, nothing in Section 515 or any other section of MPPAA suggests that Congress intended this meaning or that Congress implicitly repealed or encroached upon the NLRB's exclusive jurisdiction over post-contract expiration unfair labor practices. As this Court stated in *Kaiser Steel Corporation v. Mullins*, 455 U.S. 72, 88 (1982) "'[r]epeals by implication are disfavored,' *Allen v. Mc-*

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<sup>6</sup> Section 515 also says under "the terms of" the *plan*, but the Funds do not urge that this is a cryptic reference to labor-management relations law. The Funds do not explain how the phrase "the terms of" can change its meaning within the same sentence.

*Curry*, 449 U.S. 90, 99 (1980). [Thus] ‘the intention of the legislature to repeal must be clear and manifest.’” See also ERISA Section 514(d), 29 U.S.C. 1144(d) (“nothing in this title shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States . . . or any rule or regulation issued under any such law.”).

Here the Congress’ alleged intent to repeal the NLRB’s exclusive jurisdiction over Section 8(a)(5) violations is anything but manifest and clear. Indeed, since the NLRA, ERISA and MPPAA are such carefully crafted, excruciatingly thorough, detailed and precise statutes, it boggles the imagination to suggest that Congress left the meaning of Section 515 to be conveyed by an obscure and implausible reading of a trivial phrase—“the terms of”. Every court of appeals that has considered that suggestion has rejected it.<sup>7</sup> Section 515 applies to exactly what Congress said it applies to—contributions owed under a collective bargaining agreement—nothing else.

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<sup>7</sup> The First, Third and Fifth Circuits have all reached the same result in similar cases, *New Bedford Fishermen's Welfare Fund v. Baltic Enterprises, Inc.*, 813 F.2d 503 (1st Cir. 1987); *Moldovan v. Great Atlantic & Pacific Tea Company, Inc.*, 790 F.2d 894 (3d Cir. 1986), petitions for cert. filed, 55 U.S.L.W. 3127 (U.S. Aug. 11, 1986) (Nos. 86-203 and 86-208); *U.A. 198 Health & Welfare, Education & Pension Funds v. Rester Refrigeration Service, Inc.*, 790 F.2d 423 (5th Cir. 1986), petition for cert. filed, 54 U.S.L.W. 2621 (U.S. Aug. 20, 1986) (No. 86-262).

**2. The Legislative History Also Establishes That Congress Intended Section 515 To Make Multi-employer Plans Whole For An Employer's Breach Of Its Contractual Obligation To Make Contributions And Was Not Intended To Encroach Upon The NLRB's Jurisdiction Over Unfair Labor Practices.**

The legislative history confirms that Section 515 and Section 502(g)(2) were enacted solely to strengthen trust funds' ability to enforce employers' *contractual* obligations and to give multiemployer trust funds additional remedies where the employers did not live up to those contractual obligations. Congress was spurred to add Sections 515 and 502(g)(2) by complaints from multiemployer trust funds that employers were not complying with existing *contractual* obligations and that state court collection actions were inadequate to enforce those obligations.<sup>8</sup>

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<sup>8</sup> For example, in 1977, the Western Conference of Teamsters Pension Trust Fund presented a prepared statement addressing the problem of delinquent contributions at a Senate Oversight Hearing on ERISA. That statement makes no reference whatsoever to any problem with the remedies of the NLRA and is explicitly limited to contractual delinquencies: "The most significant, and the oldest, day-to-day problem faced by multiemployer plans is the timely collection of contributions owed the plan by employers under the bargaining agreements they have negotiated with local unions . . . . ERISA did not adequately address this problem, and no Federal law provides multiemployer plans with effective methods of enforcing bargaining agreements and related plan provisions against delinquent employers." Oversight of ERISA, 1977: Hearings on S. 2125 before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) (statement of Theodore R. Groom and T. N. McNamara, Attorneys for the Western Conference of Teamsters Pension Trust Fund) (emphasis added). In a subsequent statement, Mr. Groom wrote: "In the statement we filed with the Subcom-

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The language of present Section 515 first appeared in S. 3017, the ERISA Improvements Act of 1978, introduced by Sens. Williams and Javits on May 1, 1978. It was carried forward into S. 209, introduced by Sens. Williams and Javits on January 24, 1979. Speaking from the floor of the Senate on January 24, 1979, Sen. Williams referred to this provision as the "section requiring employers to make *agreed-upon* periodic contributions," referring to contributions required under the terms of existing labor contracts. 125 Cong. Rec. S930 (daily ed. January 29, 1979) (emphasis added). The summary and analysis of the Senate Labor Committee emphasized the collectively bargained nature of the obligation at issue: "The importance of timely receipt of *previously agreed upon* periodic contributions to a collectively bargained multiple employer plan is great. Section 516 [515] reflects the Committee's views that the *collectively bargained* obligations of an employer to contribute to such a plan merits special treatment under ERISA . . ." Senate Comm. on Labor and Human Resources, 96th Cong., 1st Sess., The ERISA Im-

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mittee last October, we recommended several measures to better enable multiemployer plans to collect contributions owed the plan by employers *under collective bargaining agreements* negotiated with local unions and to enforce related plan provisions. We strongly support the provisions of the bill which (i) would make an employer's obligation to contribute to a collectively bargained plan an obligation enforceable under ERISA and (ii) would require courts to allow reasonable attorney's fees and costs where the plan prevails in such an enforcement action." Joint Hearings Before the Subcommittee on Labor of the Committee of Human Resources and the Subcommittee on Private Pension Plans and Employee Fringe Benefits of the Committee on Finance, U.S. Senate, 95th Cong., 2d Sess. on S.3017 (1978) (emphasis added).

provements Act of 1979: Summary and Analysis of Consideration 45 (Comm. Print 1979) (emphasis added).

Neither bill passed. However, when MPPAA was being considered as S. 1076 in the Senate Labor Committee, of which Sens. Williams and Javits were, respectively, chairman and a permanent member, the mandatory remedies (contained in Section 502(g)(2), and the ERISA cause of action in Section 515 were added to the bill. See comments of Senator Javits explaining that the provisions of Sections 515 and 502(g) were from legislation previously introduced—the Williams-Javits ERISA Improvements Aet of 1979 (S.209).<sup>9</sup> 126 Cong. Rec. S20179 (daily ed. July 29, 1980). The summary and analysis of S.1076 issued by the Senate Labor Committee explains the addition of Section 515:

Delinquencies of employers in making required contributions are a serious problem for most multiemployer plans. Failure of employers to make *promised* contributions in a timely fashion imposes a variety of costs on plans . . .

Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly . . . Sound national pension policy demands that employers who *enter into*

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<sup>9</sup> Perhaps this explains why Section 515 utilizes the phrase "under the terms of" while Section 4212 contains no such language. Section 4212 and MPPAA's other withdrawal provisions were drafted largely by the Pension Benefit Guaranty Corporation (PBGC) [see 125 Cong. Rec. S9801 (daily ed. May 3, 1979)] while Sections 502(g)(2) and 515 were borrowed from prior legislation. Thus, this minor difference in wording is probably nothing more than alternative expressions by different drafters, at different times, of the same concept—an obligation to contribute under an existing collective bargaining agreement.

*agreements* providing for pension contributions not be permitted to repudiate their pension *promises* . . .

. . . The Bill imposes a Federal statutory duty to contribute on employers that are *already contractually obligated to make contributions* to multiemployer plans.

Senate Comm. on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multienployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 44 (Comm. Print 1980) (emphasis added).

The legislative history shows that Section 515 and its companion, Section 502(g)(2), were intended to reach those employers who breach a contractual promise and to provide plans with stiff, certain statutory remedies. Nothing in the legislative history even remotely suggests that Section 515 was intended to give effect to an employer's *expired* promise to pay or to create an ERISA-based obligation to continue contributions *after* the promise to pay expired.

The Funds ground their claim solely upon the NLRB's interpretation of Sections 8(a)(5) and (d) of the NLRA.<sup>10</sup>

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<sup>10</sup> Section 8(d) defines the NLRA's statutory duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment. . . ." Section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees. Unilateral changes by an employer during the course of a collective bargaining relationship concerning mandatory subjects of bargaining are normally regarded as *per se* violations of Section 8(a)(5). Accordingly, the NLRB has interpreted Section 8(a)(5) as requiring an employer to maintain the *status quo* as to wages and working conditions, even after the expiration of a collective bargaining agreement until the employer's duty to bargain is satisfied or until that duty is suspended by virtue of an impasse. *NLRB v. Katz*, 369 U.S. 736 (1962); *Peerless Roofing Co. v. NLRB*, 247 NLRB 500 (1980); *enf'd*, 641 F.2d 734 (9th Cir. 1981).

Like ERISA, the NLRA is a "comprehensive and reticulated" statute. It is designed to protect employees' rights to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining. . . ." See Section 7 of the NLRA, 29 U.S.C. 157. When it enacted the NLRA, Congress did not merely lay down substantive rules of law. It also created the NLRB to balance legitimate and often conflicting interests and congressionally expressed policies through its primary interpretation and application of those rules. Congress considered this primary, centralized administration essential to achieve that balance, to obtain uniform application of the NLRA's substantive rules and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies.

Nothing in MPPAA's legislative history suggests that Section 515 was intended to upset the NLRA's delicate balance or to supplant the NLRB's exclusive jurisdiction over Section 8(a)(5). Indeed, it is remarkable that, for all of the recitation of legislative history<sup>11</sup> in the briefs of the

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<sup>11</sup> None of the cases cited in the legislative history as examples of the evil to be eliminated involved the statutory duty to contribute under Section 8(a)(5) after expiration of the labor agreement or dissatisfaction with the NLRB as a means of obtaining payment of post-contract expiration contributions. On the contrary, they all concerned extraneous matters interposed as defenses to a clear contractual obligation arising during the term of the labor agreement. In the legislative history of Section 515, Congress mentioned three cases with approval—all cases where an existing labor agreement required contributions: *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) (employer owes contributions under labor agreement regardless of alleged set off for damages sustained by reasons of illegal strike); *Lewis v. Mill Ridge Coals, Inc.*, 298 F.2d 552 (6th Cir. 1962) (employer

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Funds and their amici, there is no indication that trust funds were unhappy with NLRB processes. Nor is there any indication that Congress wanted employee benefit funds to be able to sidestep the exclusive process of the NLRB and to proceed directly in the federal district courts on the merits of a claim that an employer has breached its statutory duty to maintain the status quo under Section 8(a)(5). Surely if Congress had intended to strike out in such a new direction, some discussion of the change and its rationale would appear in the legislative history. But there is none.

On the contrary, the legislative history cited by the Funds repeatedly refers to enforcing the employer's promise.<sup>12</sup> That promise resides only in the collective bargaining agreement. After the agreement expires, there is no employer promise; there is only the mandate of federal law that the employer not unilaterally alter the terms and conditions of employment without satisfying its NLRA duty to bargain. The employer has made no promise re-

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owes contributions under labor agreement regardless of alleged failure of consideration); and *Huge v. Long's Hauling Co., Inc.*, 590 F.2d 457 (3rd Cir. 1978) (employer owes contributions under labor agreement regardless of alleged antitrust violation and unfair labor practices committed by union). Congress also expressed disapproval of two cases—both cases where plans claimed contributions under labor agreements: *Western Washington Laborers-Employers Health and Security Trust Fund v. McDowell*, 103 LRRM 2219 (W.D. Wash. 1979) (failure of union to achieve majority status relieves employer of obligation to contribute under pre-hire agreement), and the district court decision in *Washington Area Carpenters' Welfare Fund v. Overhead Door Company*, 488 F.Supp 816 (D. D.C. 1980), *rev'd*, 681 F.2d 1 (1982), *cert. denied*, 461 U.S. 926 (1983) (same).

<sup>12</sup> Brief of Petitioners at pp. 17-18.

garding the period after the agreement expires.<sup>13</sup> Absent that promise, there is no cause of action under section 515 and no jurisdiction under section 502.

Utilizing a rather unique analysis of MPPAA and its legislative history, the Funds raise a number of arguments to support their overly broad reading of Section 515. First, they contend that "Congress did not intend to give the NLRB exclusive authority to press and resolve claims for delinquent contributions from an employer whose agreement has expired."<sup>14</sup> The proof of this, they argue, is that the Department of Labor (DOL) is expressly barred by Section 502(b)(2) from bringing collection actions under section 515 in order to protect it from undue pressure by plans to initiate collection actions against delinquent employers. They conclude that if Congress did not want the DOL to suffer these terrible pressures in enforcing ERISA, it certainly could not want the NLRB to be so beleaguered.

The fallacy of the Trust Funds' argument is that it assumes that Congress intended the NLRA and ERISA to have similar enforcement schemes and the NLRB and DOL to have similar enforcement powers and duties. That is simply not so. Very different administrative schemes were

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<sup>13</sup> The Funds warn that a "significant gap" will exist if they have no ERISA-based cause of action to collect contributions accruing from the time a contract expires to the time a new contract is entered into or a withdrawal occurs. However, this so-called gap simply does not exist and trust funds are not left without a remedy. They are merely required to proceed through the NLRB since they are enforcing an employer's duty arising out of the NLRA.

<sup>14</sup> Brief of Petitioners at p. 38.

created by the two statutes. On the one hand, no centralized administrative agency was envisioned or created for enforcement of ERISA. Instead, various enforcement responsibilities were parceled out to the IRS (qualified plan matters), the PBGC and the IRS (pension plan funding and termination), and the DOL (reporting and disclosure and fiduciary responsibility matters), with the balance of responsibilities left to plan fiduciaries. Thus, in enacting ERISA, Congress did not consider centralized governmental administration of the statute to be important and left enforcement of the law and protection of the private rights flowing therefrom primarily to private parties.

On the other hand, in passing the NLRA, Congress did not merely create a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. Instead, it created the NLRB and gave it the exclusive responsibility to adjudicate unfair labor practice claims. There is no undue pressure in asking the NLRB to do what it was created and statutorily mandated to do.

The Funds and the Solicitor General opine that the NLRB's limited resources and personnel may not be sufficient to handle all of the unfair labor practice charges that may be filed by trust funds over post-contract expiration contributions. They further claim that the Board's limited resources could be better used if the plans were able to submit these claims directly to the court. However, more than 50 years of experience has shown the NLRB to be well equipped to interpret and enforce the NLRA and to fashion national labor policy.

Further, even assuming that the Board's resources were for some reason insufficient to enforce these claims,

the fact remains that Congress assigned this responsibility to the NLRB and chose not to create a private right of action for unfair labor practices. *Cement Masons Health & Welfare Trust Fund v. Kirkwood-Bly, Inc.*, 520 F.Supp. 942, 943 (N.D.Cal. 1981), *aff'd* 629 F.2d 641 (9th Cir. 1982). Thus, "the dispositive question" is not whether a private right of action is desirable but "whether Congress intended to create any such remedy. Having answered that question in the negative, [the court's] inquiry is at an end." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979). Accordingly, arguments concerning the Board's limited resources and the desirability of a right of action are best directed to Congress and not to the Court. *See, Touche Ross & Co. v. Redington*, 442 U.S. 560, 579 (1979) ("If there is to be a federal damage remedy under these circumstances, Congress must provide it. '[I]t is not for us to fill any hiatus Congress has left in this area . . . ' "); *see also, Taylor v. Brighton Corp.*, 616 F.2d 256, 264 (6th Cir. 1980).

As a final argument, the Funds note that, before MPPAA, employee benefit funds already had a cause of action under Section 301 of the Labor-Management Relations Act to collect delinquent contributions under an existing labor agreement. They reason that if Section 515 of ERISA is limited to contributions due under an existing labor agreement, then it is merely duplicative of Section 301 of the LMRA. From this, they conclude that Congress evidently intended to arm employee benefit plans with a potent new weapon that permits them to bypass the NLRB.

Again, however, this argument conveniently ignores the specific purpose of Section 515. As noted previously,

Sections 515 and 502(g) were enacted to give effect to an employer's contractual promise to make contributions and to give plans added remedies when employers breach that promise. Section 515 creates an ERISA-based right to contractually mandated contributions independent of Section 301 and acts as a springboard into the new provisions of Section 502(g) for mandatory prejudgment interest, mandatory attorney fees and costs, and the other mandatory relief described in the statute. These remedies are the potent new weapon previously unavailable to plans under Section 301 that Congress provided in MPPAA, and Section 515 was the technical change necessary for the funds to take advantage of them.

Section 515 also enlarged on the cause of action under Section 301 by including a cause of action for breach of the terms of the plan itself. As the representatives of the Western Conference of Teamsters Pension Trust Fund noted in their statement in the 1977 Oversight Hearings, lawsuits under Section 301 of the LMRA enabled funds to collect the delinquent contributions due under the labor agreement but would not always permit the funds to collect other items of damages provided in the plan document, such as attorney fees or liquidated damages. Section 515 expanded on the pre-existing cause of action by permitting funds to enforce *plan* provisions beyond the basic contribution specified in the labor agreement.

While Section 502 suits provide relief very different from that available in Section 301 actions, Sections 502 and 301 are both intended to give effect to contractual rights and should, therefore, be applied in a similar fashion for the purpose of determining jurisdiction. *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. — (1987);

*Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. — (1987), 107 S.Ct. 1549 (1987). It is well established that after a collective bargaining agreement expires, the parties' rights, duties and obligations are determined by the NLRA and not by their expired contract. Thus, claims based solely on an employer's unilateral change in working conditions fall within the exclusive jurisdiction of the NLRB and federal courts are without Section 301 jurisdiction over those disputes. *Cement Masons Health and Welfare Trust Funds v. Kirkwood-Bly, Inc.*, *supra*. Since Congress intended Section 502 jurisdiction to be treated in a similar fashion, a similar result should obtain. Like Section 301, Sections 502 and 515 do not give federal courts jurisdiction over claims for post-expiration contributions that arise solely under Section 8(a)(5).<sup>15</sup>

**B. Requiring Plans To Resort To The NLRB Will Not Harm Plans Or Cause Trustees To Breach Their Fiduciary Duties.**

There is no question that Congress intended to afford certain rights and protections to plans when it enacted ERISA. It is also undisputed that MPPAA was intended to protect the financial health of multiemployer pension plans by imposing liability on withdrawing employers. However, recognizing that Section 515 was not intended to reach claims for post-contract expiration contributions does not interfere with the statutory protections of

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<sup>15</sup> This situation is not to be confused with Section 301 contract actions that involve breaches of collective bargaining agreements and conduct constituting unfair labor practices. There, the Court has allowed concurrent jurisdiction in the NLRB and the courts. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962). Here, however, there is no coexisting contract or contract obligation. The Funds' claims are based solely on the NLRA. Those claims may be asserted only before the NLRB.

ERISA. If plans have no statutory right under Section 515 to such contributions and must rely on duties and obligations arising solely out of Section 8(a)(5), then plans do not actually seek the protections of ERISA but assert an employer's duty arising out of the NLRA as interpreted and applied by the NLRB. In other words, it is the source of the right plans seek to enforce, and not their status as plans, that determines what law applies and which forum has the power to enforce it.

The NLRA was enacted to give effect to the collective bargaining process as a means of achieving industrial peace. That is why employers are not permitted to make unilateral changes in working conditions before they satisfy their statutory duty to bargain. Plans are beneficiaries of the collective bargaining process since it is typically through that process and resulting collective bargaining agreements that plans come into being and derive their funding. Plans, therefore, have a legitimate stake in having an employer comply with its bargaining obligations and may act to protect their interests like any other charging party under the NLRA. *NLRB v. Indiana & Michigan Electric Company*, 318 U.S. 9 (1943) ("[S]trangers to the labor contract [are] . . . permitted to make the charge. The charge is not proof. It merely sets in motion the machinery of an inquiry."); *see also* 29 U.S.C. 160(b), and 29 C.F.R. 102.9 (1981). However, nothing in the NLRA entitles plans to special treatment or status. Their right to seek redress for an unfair labor practice and their right to relief under the Act is the same

as any party affected by an employer's unfair labor practice. Treating plans as normal charging parties permits them to enforce Section 8(a)(5) and effectuates the purposes and policies of the NLRA.

The Funds argue that should the Court recognize the NLRB's exclusive jurisdiction over contribution obligations arising from Section 8(a)(5), funds will be denied the remedies provided under Section 502(g)(2) of ERISA. But the Funds erroneously assume that plans are entitled to Section 502 relief under such circumstances. They are not. An 8(a)(5) violation is a violation of the NLRA and plans are not entitled to Section 502 relief merely because an employer violates its statutory duty to bargain. It is the Board's responsibility to fashion remedies for unfair labor practices that will effectuate the purposes and policies of the Act. If the Board deems it appropriate to award lost return on investment, additional administrative costs, liquidated damages and attorney's fees for an employer's 8(a)(5) violation, then it will make such an award.<sup>16</sup>

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<sup>16</sup> ERISA Sections 515 and 502 and NLRA Section 8(a)(5) are directed to two entirely different evils. In enacting Section 515, Congress had in mind routine collection actions where the employer had no valid defense but chose to put the fund through a lawsuit simply as a device for delay or compromise. Section 502 relief was intended to discourage such devices by assuring that the employer has nothing to gain—and much to lose—by forcing the fund to litigation. On the other hand, Section 8(a)(5) violations are not such open and shut cases. Unlike mere collection actions, a Section 8(a)(5) case typically involves difficult issues of fact and complex legal issues that go to the heart of a carefully balanced labor-management relationship. Thus, in the 8(a)(5) context, employers are more likely to have legitimate defenses to liability that are asserted in good faith and not for the purpose of delay or compromise.

The Funds assume that the NLRB is without the statutory authority to grant such relief. This assertion ignores the broad remedial powers vested in the NLRB under Section 10(c) of the NLRA which, in pertinent part, allows the Board to fashion both affirmative and injunctive remedies. The Board was given such broad powers to fulfill its obligation to effectuate national labor policy. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 215-216 (1964).

As this Court stated in *Fibreboard*, where the Board finds that an unfair labor practice has been committed, Section 10(c) provides that it shall "issue . . . an order . . . as will effectuate the policies of this Act. . . ." *Id.* at 215. Citing several of its earlier cases, the Court went on to say at p. 216:

The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* "[T]he relation of remedy to policy is peculiarly a matter for administrative competence. . . ." [citation omitted] "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." [citation omitted]. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act."

The Court affirmed the NLRB's order based on the fact that "[t]here has been no showing that the Board's order restoring the *status quo ante* was not well designed to promote the policies of the Act." *Ibid.*<sup>17</sup>

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<sup>17</sup> By requiring an employer to return to the *status quo ante* the NLRB does not give effect to the expired contract, but en-

The NLRB has repeatedly used its power to fashion appropriate remedies where it found that unilateral changes, including the cessation of fringe benefit or pension fund contributions, were made in violation of Section 8(a)(5). For example, in *Stone Boat Yard and United Brotherhood of Carpenters and Joiners of America, Local 1149, AFL-CIO*, 264 NLRB 981 (1983) *enf'd sub nom. Stone Boat Yard v. NLRB*, 715 F.2d 441 (9th Cir. 1983), *cert. den.*, 446 U.S. 937 (1984), which was decided well after Sections 515 and 502 were added to ERISA, the Board concluded that the employer committed an unfair labor practice under Section 8(a)(5) by stopping payments to union fringe benefit and pension plans following the expiration of a collective bargaining agreement. The Board ordered the employer to resume making contributions, to pay contributions owed from the time the collective bargaining agreement expired, and to make employees whole, including interest for any losses or expenses they incurred due to the employer's cessation of payments to the plans. In 264 NLRB at 983, n.6, the Board also left open the possibility for additional remedies bearing a striking resemblance to those available under Section 502(g)(2):

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forces the employer's duty to bargain in good faith before implementing change. Thus, the Board forces an employer to maintain the wages, hours and other terms and conditions of employment in effect at the time of contract expiration. The Board also requires the employer to continue certain employment practices that were not in the contract, but are nonetheless part of the employment relationship. However, it does not require the continuation of employment terms which exist solely by virtue of the contract. Such "contract" terms include union security, dues checkoff and arbitration. *Industrial Union of Marine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 619-620 (3rd Cir. 1963).

Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question whether Respondent [the employer] must pay any additional amounts into benefit funds in order to satisfy our "make-whole" remedy. These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue, and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses.

Cases like *Stone Boat Yard* make it clear that the NLRB *can* and, in appropriate circumstances, will award relief like that available under Section 502(g)(2).<sup>18</sup> See e.g. *G.T. Knight Company, Incorporated*, 268 NLRB 468, 469-70 (1984); *Samuel Kosoff & Sons, Inc.*, 269 NLRB 424, 430-31 (1984); *Advanced Installations, Inc.*, 268 NLRB 640, 641 n.11 (1984). If Section 502(g)(2) remedies have been incorporated into a trust agreement, the Board need

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<sup>18</sup> In a subsequent backpay proceeding, the NLRB directed Stone Boat Yard to pay liquidated damages to the trust funds based upon the trust funds' loss of the investment return on the funds withheld by the employer. *Stone Boat Yard*, 276 NLRB 1185, 1189 (1985). See also *Merryweather Optical Co.*, 240 NLRB 1213, 1216 n.7 (1979) ("These additional amounts may be determined, depending upon the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses.").

only refer to that agreement to fashion appropriate relief.<sup>19</sup> If such remedies have not been incorporated, a fund need only show the loss that it has sustained as a result of the 8(a)(5) violation. That proof is in the trustees' hands since the actual amount of contributions owed can be calculated from the agreement, the trusts' investment manager or actuary can calculate any investment loss<sup>20</sup> and the trustees will have bills for collection costs, presumably including attorney's fees. Thus, the Funds' claim that the NLRB cannot give an adequate remedy is simply not so and must be rejected.

Further, post-contractual contributions represent but a very small, isolated and insignificant source of plan funding. Yet the Funds try to build this molehill into a mountain by complaining that if forced to resort to the NLRB they will be left liable for benefits for which they have received no corresponding contributions. These assertions are nonsense. ERISA does nothing more than require defined benefit pension plans to pay the benefits promised

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<sup>19</sup> Indeed, this may be the best way for drafters of multi-employer plans and trust agreements to be assured that parties to them will know the cost of a wrongful cessation of contributions.

<sup>20</sup> Since the double interest or liquidated damages portion of Section 502(g)(2) was included to help funds recover investment losses, that part of the remedy is presumably included in the *Stone Boat Yard* calculation. The subsequent order awarding liquidated damages confirms this.

under the plan document.<sup>21</sup> Here, only two of the Funds are pension plans and nothing suggests that they are defined benefit plans. Further, the Funds operate from the mistaken assumption that they have an absolute right to these contributions when in fact their entitlement is contingent upon a finding that an employer has violated a duty under the NLRA as interpreted by the NLRB. The benefits promised by a plan are purely a question of plan design for which the trustees alone are responsible. The trustees' economic policy decision to promise benefits based on service for which they are not certain of receiving contributions is solely the trustees' responsibility.<sup>22</sup>

The Funds also complain that forcing them to resort to the NLRB places the trustees in jeopardy of violating their fiduciary responsibilities under ERISA.<sup>23</sup> This is

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<sup>21</sup> In a "defined benefit" pension plan an employee's pension is not calculated directly on the basis of the contributions made for him by his employer, but on a formula using, for example, a participant's age, service and rate of pay at retirement.

<sup>22</sup> The Funds' argument is really a tempest in a teapot. All the DOL has said is that if a plan promises benefits, they must be paid. If an employer has no duty to make contributions, then the trustees must otherwise plan for an adequate source of funding to cover the plan's promise. There are many instances—such as when an employee works overtime hours for which an employer is not required to pay contributions under the collective bargaining agreement—in which plans grant service credit not matched by contributions. These liabilities are merely factored into the overall equation of assets and liabilities when the plan's actuary sets the plan's promised level of benefits.

<sup>23</sup> This argument also overlooks the fact that unions stand in a fiduciary relation to their members, yet unions are limited to filing unfair labor practice charges with the NLRB to protect their members from violations of Section 8(a)(5). Note, *Two-Tier Wage Discrimination and the Duty of Fair Representation*, 98 Harv. L.Rev. 631, 643, n. 62 (1985); Rosen, *Fair Representation*,

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not so. Under ERISA, trustees must "discharge [their] duties . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." ERISA Section 404, 29 U.S.C. 1104.

ERISA does not require trustees to achieve success in collection actions. Trustees are not guarantors of contributions. Rather, ERISA merely requires trustees to act in a prudent manner and to seek delinquent contributions in conformance with the law. Where, as here, funds seek contributions based solely upon the employers' unilateral action in alleged violation of Section 8(a)(5), the funds' unfair labor practices claims may be pursued only before the NLRB. Thus, requiring plan trustees to resort to the Board for such post-expiration contributions is consistent with the law and would satisfy the trustees' fiduciary responsibilities as a matter of law.<sup>24</sup>

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*Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining*, 15 Hastings L.J. 391, 396 (1964) and cases cited therein. To the best of our knowledge, no court has ever held that the exclusivity of the remedy prevents union officials from discharging their fiduciary duties to their members. To the contrary, this Court has upheld the exclusivity of the remedy over a dissent that raised the fiduciary argument. *Amalgamated Assoc. of Street, Electric Railway & Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971). There is no reason why trust funds should be accorded different or preferential treatment.

<sup>24</sup> Cf. Prohibited Transaction Class Exemption 76-1, 41 Fed. Reg. 12740 (1976) (no prohibited transaction with regard to delinquent contributions as long as the plan makes "such reasonable, diligent and systematic efforts as are appropriate under the circumstances to collect such contributions").

The Trust Funds also complain that having to bring delinquency actions before the NLRB is unfair because they may not know a delinquency exists within the NLRA's six-month statute of limitations for bringing unfair labor practices, and may breach their fiduciary duties by failing to initiate unfair labor practice procedures in a timely fashion. However, funds must surely be able to keep track of whether contributions are being made by a covered employer.<sup>25</sup> If not, then plan participants are better served by the six-month statute of limitations since plan fiduciaries will be forced to fulfill their duties in a timely manner. Requiring plans to file charges within the NLRB's shorter statute of limitations will also effectuate the purposes of ERISA by avoiding the loss caused by prolonged delinquencies.

The Court has recognized the importance of resolving disputes concerning breach of fiduciary duties in accordance with Section 10(b) of the NLRA.<sup>26</sup> In the context of

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<sup>25</sup> Most employers pay pension and welfare benefit plan contributions monthly. Welfare plan contributions usually are then disbursed from funds in the same month as benefits or premiums for group health, disability, or life insurance contracts. Here, the Funds are no exception to that common practice. They received contributions on a monthly basis. Moreover, it cannot be argued that the Funds were unaware of Advanced Lightweight's post-expiration cessation of contributions within this six-month period since the Funds initiated their suits six months and one day after expiration of the union contracts. Perhaps this is merely a coincidence. However, a more likely explanation is that the Trust Funds purposefully allowed this six-month period to run in order to avoid the NLRB's administrative processes. If that is the case, then the Funds cannot complain about the NLRA's six-month statute of limitations.

<sup>26</sup> Section 10(b) provides, in pertinent part: "[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . ." 29 U.S.C. 160(b).

suits under Section 301 for breach of a union's duty of fair representation, the court adopted the six-month statute of limitations provided by the NLRA. *Del Costello v. Teamsters*, 462 U.S. 151 (1983). The rationale for adopting the statute of limitations applicable to unfair labor practice charges was that allegations of fiduciary breach should be resolved in as quick and uniform a manner as possible. The Court stated:

“[T]he need for uniformity” among procedures followed for similar claims . . . as well as the clear congressional indication of the proper balance between [bargaining relationships and finality of private settlements, and employees’ interests in remedying unfair treatment under the collective bargaining system] counsels the adoption of 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this.

*Id.* at 171.

The Court also noted that “it is of the utmost importance that the law reflect the realities of industrial life and the nature of the collective bargaining process.” *Id.* at 172. There is no reason why this rationale does not apply with equal force to participants and plans asserting claims arising solely out of the NLRA.

**C. Allowing District Courts To Decide Section 8(a)(5) Issues Would Do Serious Harm To The NLRA’s Comprehensive Scheme And Frustrate The Purposes Underlying Section 515.**

The Funds’ claims are grounded solely upon an employer’s statutory bargaining duty arising out of the National Labor Relations Act. When Congress passed that statute, it created a comprehensive scheme for the central-

ized administration and uniform application of the NLRA's substantive rules. It assigned primary application of these substantive rules to the National Labor Relations Board. Congress sought to create in the Board an agency which could, through its experience and expertise, fashion and effectuate national labor policy consonant with the policies and purposes of the NLRA. Congress also expected the NLRB to utilize its experience and expertise when making factual findings in this specialized field of knowledge. Courts do not possess and cannot be expected to possess the same experience and expertise. Thus, under the NLRA, it is for the Board to strike an appropriate balance between conflicting congressional policies and other legitimate interests and to apply its decision to effectuate the purposes and policies of the NLRA. Likewise, under the NLRA the Board acts as the initial fact-finder in unfair labor practice proceedings and the courts are directed to accept those factual findings as final and binding provided they are supported by substantial evidence. *See NLRA Section 10(e), 29 U.S.C. 160(e) ("[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive."*)

Allowing funds or plans to sue over contributions allegedly due under Section 8(a)(5) of the NLRA would defeat Congress' statutory plan and create the very diversities and conflicts Congress sought to avoid when it created the NLRB. It would also inject uncertainty and permit undue judicial interference in the collective bargaining arena. The arguments to support this point are well presented by the briefs amici curiae of the Chamber of Commerce of the United States and the Associated General

Contractors of America, Inc. and need not be repeated except to emphasize one important point. This case poses difficult issues of fact and complex questions of federal labor law requiring the Board's initial interpretation. For example, the parties disagree on whether Advanced Light-weight and the Unions were at a bargaining impasse. Whether or not a bargaining impasse exists is a highly sophisticated and difficult issue best directed to the NLRB. As noted by the NLRB, "[w]hether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations, are all relevant factors to be considered in deciding whether an impasse in bargaining exist[s]." *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), *aff'd sub nom. AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968). These are all factors which only the Board can properly consider and weigh in the first instance for the purpose of determining an unfair labor practice.

Further, factual and legal issues exist concerning the unions' waiver of bargaining rights and their failure to satisfy their statutory bargaining obligations under Section 8(b)(3)<sup>27</sup> of the NLRA. If either of Advanced Light-weight's positions are correct, then it was entitled to make unilateral changes and to cease trust fund contributions,

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<sup>27</sup> Section 8(b)(3), 29 U.S.C. 158(b)(3) provides that:

"It shall be an unfair labor practice for a labor organization or its agents—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a) . . . ."

even in the absence of an impasse. These defenses pose difficult factual and at least one legal labor policy issue of first impression which must be addressed by the NLRB<sup>28</sup> and not by the court.<sup>29</sup>

The Funds argue that federal courts should be allowed to decide Section 8(a)(5) violations in collection actions under Section 515 because they are allowed to decide such questions in withdrawal liability actions. But the Funds are wrong: the withdrawal liability provisions of ERISA do *not* license the district courts to decide Section 8(a)(5) violations. Withdrawal liability actions do not present any question of violation of Section 8(a)(5) and, unlike claims

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<sup>28</sup> While the NLRB has developed a body of decisional law concerning a union's waiver of bargaining rights, it appears never to have decided whether or not an employer may make post-contract expiration unilateral changes in working conditions where a union fails to satisfy its statutory duty to bargain and thus precludes the parties from reaching a bona fide bargaining impasse. Thus, even assuming that the district courts do have jurisdiction over Section 8(a)(5) claims under ERISA Section 502, they still would not have NLRB case law from which to draw in order to determine the parties' substantive rights, duties and obligations. Such issues of first impression should be left for initial decision by the NLRB.

<sup>29</sup> A serious question also exists as to whether or not these various defenses could be raised in a district court action. The court has held that union unfair labor practices may generally not be raised as defenses in federal contract actions. See *Kaiser Steel Corp. v. Mullins*, *supra* at p. 81; *Waggoner v. R. McGraw, Inc.*, 607 F.2d 1229, 1235 (9th Cir. 1979). Thus, sending these Section 8(a)(5) claims to district court may create the anomalous situation of trust funds being able to assert rights and duties arising under the National Labor Relations Act but employers being precluded from asserting the unions' breach of its statutory duty as a defense. Denial of such defenses would raise issues of constitutional proportions concerning due process. Those issues may be avoided by placing both statutory claims under Section 8(a)(5) and defenses to them solely before the NLRB.

of violation of Section 8(a)(5) in a collection context, could not be brought before the NLRB in any event.

The Funds' argument overlooks the essential distinction between collection actions and withdrawal liability actions. In a post-expiration collection action, a plan claims that the obligation to contribute *continues* under Section 8(a)(5) of the NLRA and that the employer is in *violation* of that statutory obligation. In essence, the plan charges the employer with an unfair labor practice, over which the NLRB has exclusive jurisdiction.

By contrast, in a withdrawal liability action, the plan claims that the obligation to contribute has *permanently ceased*.<sup>30</sup> Even if true, this claim by the plan does not constitute an unfair labor practice by the employer. The NLRB would have no jurisdiction over such a claim, since no one is charged with violating the NLRA. Even if there is a contest over when the obligation ceased, there still is no claim that Section 8(a)(5) has been violated and therefore no NLRB jurisdiction at all.<sup>31</sup>

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<sup>30</sup> A permanent cessation of the obligation to contribute is not necessarily synonymous with an impasse, nor does an impasse relieve the employer of its statutory duty to bargain. *Plymouth Locomotive Works, Inc.*, 261 NLRB 595 (1982); *Flex Plastics, Inc.*, 262 NLRB 651 (1982), *enf'd*, 726 F.2d 272 (6th Cir. 1984). At most, an impasse only temporarily suspends the duty to bargain and can be broken at any time by a material change in circumstances. *Gulf States Manufacturing, Inc. v. NLRB*, 704 F.2d 1390 (5th Cir. 1983).

<sup>31</sup> The only two cases cited by the Funds on this point are contests over when the obligation ceased. *Woodward Sand Company, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691 (9th Cir. 1986), and *I.A.M. National Pension Fund v. Schulze Tool and Die Co., Inc.*, 564 F. Supp.

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Giving federal courts jurisdiction over withdrawal liability actions, therefore, provides the *only* forum in which such issues can be resolved and does not invade the exclusive jurisdiction of the NLRB to adjudicate claims of unfair labor practices. The issues presented to the federal court in a withdrawal liability case may bear some resemblance to issues decided by the NLRB in unfair labor practice charges,<sup>32</sup> but the fact remains that nothing in MPPAA

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1285 (N.D. Cal. 1983). It is noteworthy that neither case presented a claim that the employer had violated Section 8(a)(5) of the NLRA and, therefore, neither case could have been brought before the NLRB. In addition, both of those cases are historical anomalies. The issue over when the obligation to contribute ceased arose only because the labor disputes in those cases straddled the effective date of MPPAA. The plans sought to place the cessation on a date after MPPAA took effect, and the employers sought to place it on a date before MPPAA took effect, thereby relieving themselves of liability. Needless to say, that fact pattern will never recur.

<sup>32</sup> The funds are simply wrong when they assert that withdrawal liability cases necessarily involve determination of the issue of impasse. Under MPPAA, the mere existence of a "labor dispute" under Section 4218 is sufficient to prevent a withdrawal. Thus, withdrawal liability disputes in the context of a labor dispute require the court to decide *only* whether a labor dispute exists, not the subtle question of whether and when an impasse was reached. *Marvin Hayes Lines, Inc. v. Central States Pension Fund*, 6 Employee Benefits Cases (BNA) 2375 (M.D. Tenn. 1985); *T.I.M.E.-DC, Inc. v. IAM National Pension Fund*, 597 F. Supp. 256 (D.D.C. 1984) (finding the existence of a labor dispute and concluding that the existence of a labor dispute does not depend on the existence or absence of an impasse); *T.I.M.E.-DC, Inc. v. New York State Teamsters Conference Pension and Retirement Fund*, 580 F. Supp. 621, 629 (N.D.N.Y. 1984) ("[the plan] suggests that an impasse will trigger withdrawal liability. In fact, the concept of impasse is wholly irrelevant to the issues here. As merely a stage in the labor dispute, there is simply no talismanic significance of the presence of an 'impasse'. (footnotes omitted)'"); *T.I.M.E.-DC, Inc. v. Trucking Employees of North Jersey Welfare Fund, Inc.*, 560 F. Supp. 294 (E.D.N.Y. 1983).

—including the withdrawal liability provisions—gives federal courts jurisdiction over any claim of violation of the NLRA.

Authorizing the district courts to decide Section 8(a)(5) claims under Section 515 would also frustrate the purpose underlying ERISA's Sections 502(g) and 515. The legislative history cited by the Funds makes repeated reference to Section 515's goal of eliminating "lengthy, costly and complex litigation concerning claims and defenses unrelated to 'the employer's promise of contributions.'"<sup>33</sup> Clearly the obligation to maintain the *status quo* under Section 8(a)(5) of the NLRA and an employer's defenses thereto are unrelated to the employer's promise to pay. Thus, assuming that the purpose of Section 515 was to strip away such unrelated issues in collection actions brought in federal court, application of Section 8(a)(5) to such actions would reinject extraneous defenses in Section 502/515 collection actions and frustrate that legislative goal. If the purpose of Section 515 was to avoid such defenses in federal court collection actions, then that purpose also mandates that claims based upon an employer's statutory duty to maintain the *status quo* under Section 8(a)(5) be decided by the NLRB and not by the courts.

In addition, sending Section 8(a)(5) claims to district court would frustrate ERISA because it would require the needless expenditure of plan assets on uncertain claims.<sup>34</sup>

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<sup>33</sup> See Brief of Petitioners at p. 18.

<sup>34</sup> One issue before the Board in *Advanced Installations, Inc.*, *supra*, was whether the cessation of payments to several differ-

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The NLRB's processes are impartial, efficient and, most importantly, free. Although funds have ample opportunity to participate in NLRB processes to the extent they desire (as explained in the brief amicus curiae of the Chamber of Commerce of the United States), prosecution of unfair labor complaints before the NLRB does not require charging parties to be represented by counsel and certainly does not involve the same substantial investment of attorney's fees as court litigation. Indeed, judicial litigation costs in even a moderately complex "unfair labor practice" collection case might quickly outstrip the amount of contributions sought and result in virtually no return to the plan because the employer prevailed. In that event, participants and plans alike would be harmed and not benefited by collection actions of this type because the assets of the plan could actually be diminished by the cost of fully litigating the case in court. This, in turn, would make less money available for plan benefits. Such a result can be avoided by simply recognizing that Section 8(a)(5) claims do not belong in federal court. Rather, they are best suited to the efficient and inexpensive administrative procedures of the NLRB.

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ent benefit funds violated Section 8(a)(5). The Board noted in its Supplemental Decision and Order awarding backpay and past due contributions that "[t]he specification alleges an amount due the Carpenter Industry Advancement Fund of Southern California. The cessation of payments into such funds does not violate Sec. 8(a)(5) of the Act and a Board order requiring payments into such funds is improper." *Supra*, at p. 640, n.2. The resolution of this uncertain issue in the courts could have involved an extensive, expensive legal battle.

## **CONCLUSION**

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1987

LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,  
*Petitioners,*

v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent.*

On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1937

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No. 85-2079

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LABORERS HEALTH AND WELFARE TRUST FUND  
FOR NORTHERN CALIFORNIA, *et al.*,  
*Petitioners,*  
v.

ADVANCED LIGHTWEIGHT CONCRETE CO., INC.,  
*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Ninth Circuit**

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**REPLY BRIEF OF PETITIONERS**

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**INTRODUCTION**

In our opening brief, we demonstrated that a federal district court has jurisdiction under Sections 502 and 515 of the Employee Retirement Income Security Act of 1974, as amended (hereinafter "ERISA"), 29 U.S.C. §§ 1132 and 1145, over an action by the trustees of multi-employer employee benefit plans to collect contributions from a delinquent employer, where the employer's alleged obligation to make contributions arises from its duty under Section 8(a)(5) of the National Labor Relations Act, as amended (hereinafter "NLRA"), 29 U.S.C. § 158 (a)(5), to continue to adhere to the terms of the expired collective bargaining agreement which provided for such contributions. Nothing in the answering briefs of Respondent and its *amici* refutes our position.

**ARGUMENT****I. The Language Of Section 515 Is Properly Read To Require Employers To Comply With All Their Legal Obligations To Make Contributions To Multiemployer Plans Based On The Terms Of The Collective Bargaining Agreement.**

Respondent first argues (Resp. Br. 8-13) that the plain language of Section 515 of ERISA authorizes federal courts to adjudicate only collection claims arising under unexpired collective bargaining agreements. But, as noted in our opening brief (at 13-15), Section 515's language is not so limited. It states that "[e]very employer who is obligated to make contributions to a multiemployer plan . . . under the terms of a collectively bargained agreement shall . . . make such contributions in accordance with the terms and conditions of . . . such agreement" (29 U.S.C. § 1145). Respondent is "obligated to make contributions." That obligation is quite properly described as one "under the terms of a collectively bargained agreement": the source of Respondent's obligation to Petitioners is the legal requirement that it honor the terms of the agreement into which it entered. That the source of that requirement is the NLRA rather than contract law does not take this case out of the language of Section 515. *See American Distributing Co. v. NLRB*, 715 F.2d 446, 452 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984); *Hinson v. NLRB*, 428 F.2d 133, 139 (8th Cir. 1970).

Moreover, contrary to Respondent's suggestion, the separate reference in the definition of the term "obligation to contribute" in Section 4212(a) of ERISA, 29 U.S.C. § 1392(a), to contribution obligations arising "as a result of a duty under applicable labor-management relations law" in no way suggests that such NLRA-based contribution obligations are not also covered by Section 515. The separate reference to NLRA-based contribution obligations in the definition of the term "obligation to contribute" in Section 4212(a) results from the particular

function that that statutory provision serves in the “withdrawal liability” part of the statute. An employer incurs “withdrawal liability”—*i.e.*, liability for a portion of a multiemployer pension plan’s unfunded vested benefits—when it “withdraws from a multiemployer plan in a complete withdrawal” (29 U.S.C. § 1381(a)); a “complete withdrawal” occurs when an employer “permanently ceases to have an obligation to contribute under the plan” (29 U.S.C. § 1383(a)(1)); and Section 4212(a) defines this “obligation to contribute” (29 U.S.C. § 1392(a)). Specifically, it lists in detail the various contribution obligations that do and do not affect the imposition of withdrawal liability. Section 515, by contrast, does not separately list the contribution obligations that are (and are not) covered by its terms because it is all-inclusive and admits no exceptions.

Finally, the clause “the terms of” cannot be read out of Section 515’s phrase “under the terms of a collectively bargained agreement,” as Respondent would dismiss the clause. The clause is not “obscure”; as noted above, it has a well-established meaning in labor-management relations law, a meaning that was understood by the Congress enacting Section 515 (as Section 4212(a) evidences). Nor is the clause “trivial”; as noted in our opening brief (at 22 n.9), it is part of a Congressional enactment and, for that reason alone, is entitled to independent legal meaning.

**II. The Legislative History Shows That The Broader Interpretation Of Section 515 (As Providing Trustees Of Multiemployer Plans With A Single, Efficient Cause Of Action For The Collection Of All Delinquent Contributions, Including Delinquencies Attributable To NLRA-Based Obligations) Better Serves The Purposes Expressed By Congress.**

Respondent similarly errs in suggesting (Resp. Br. 14-24) that the legislative history shows that Congress enacted Section 515 *solely* to strengthen the ability of trust

funds to enforce employers' contractual contribution obligations. It is true, of course, that the failure of employers to comply with contractual contribution obligations served as the paradigm for Congress's discussions concerning the delinquency problem. But, as explained in both our opening brief (at 15-20) and the brief *amicus curiae* of the United States (at 14-18), the legislative history shows that Congress viewed the problem of delinquencies as part of a larger problem—the problem of preserving the financial health of multiemployer employee benefit plans—and that Section 515 was intended to be a part of the solution to this larger problem. Interpreting Section 515 as providing plan trustees with a single, efficient remedy for the collection of all delinquent contributions, including delinquencies attributable to NLRA-based obligations, thus promotes Congress's larger purpose in enacting the legislation.

In addition, Respondent's suggestion (Resp. Br. 23) that Section 515 was merely "the technical change" necessary for the trust funds to take advantage of the mandatory remedies of Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2), is belied by the legislative history. As noted in our opening brief (at 16), the version of the Multiemployer Pension Plan Amendments Act of 1980 (hereinafter "MPPAA"), Pub. L. No. 96-364, 94 Stat. 1208, initially passed by the House in 1980 amended Section 502 to authorize a court to award, if the multiemployer plan so provides, reasonable attorneys' fees, costs of action, and liquidated damages (in an amount up to 20 per cent of the delinquency) in any civil action to collect delinquent contributions. Prior to the MPPAA, such civil actions to collect delinquent contributions were brought under Section 301 of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA"), 29 U.S.C. § 185, or Section 502 of ERISA, 29 U.S.C. § 1132, or both. See, e.g., *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72 (1982); *Carpenters Local Union No. 1846 v.*

*Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), cert. denied, 464 U.S. 932 (1983); *Washington Area Carpenters' Welfare Fund v. Overhead Door Co.*, 488 F. Supp. 816 (D. D.C. 1980), rev'd, 681 F.2d 1 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). While the remedial provisions of the version of the MPPAA initially passed by the House in 1980 were discretionary, that version makes clear that Congress could have made the remedial provisions mandatory in any civil action to collect delinquent contributions simply by amending Section 502, without adding Section 515. That Congress decided both to amend Section 502 and to add Section 515 belies Respondent's contention that Section 515 was merely a "technical change" and supports the broader reading of Section 515 as including both contractual and NLRA-based obligations to contribute.<sup>1</sup>

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<sup>1</sup> Respondent incorrectly asserts (Resp. Br. 23) that "Section 515 expanded on the pre-existing cause of action by permitting funds to enforce *plan* provisions beyond the basic contribution specified in the labor agreement" (emphasis in original). Both prior and subsequent to the MPPAA, Section 301 of the LMRA and Section 502 of ERISA have provided a federal forum for suits by plan trustees to enforce the provisions of trust agreements. See, e.g., *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 366 n.2 (1984); *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 564 n.4, 565 (1985). Throughout that period, Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), has provided in relevant part that a "civil action may be brought . . . by a . . . fiduciary . . . to redress . . . violations or . . . to enforce . . . the terms of the plan."

Moreover, Respondent errs in suggesting (Resp. Br. 23-24) that this Court's opinions in *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. —, 95 L.Ed.2d 39 (1987), and *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. —, 95 L.Ed.2d 55 (1987), support Respondent's contention that the duty imposed on an employer by Section 515 of ERISA to pay contributions the employer is obligated to make includes only contractual, and not NLRA-based, obligations to contribute. While this Court concluded in *Dedeaux*, 95 L.Ed.2d at 52-53, and *Taylor*, 95 L.Ed.2d at 64, that the preemptive force of Section 502(a) of ERISA was modeled after the

### **III. Requiring The Trustees Of Multiemployer Plans To Rely Upon The NLRB Enforcement Scheme Will Undermine Both The Financial Health Of Multiemployer Plans And The Ability Of Trustees To Carry Out Their Fiduciary Duties.**

Respondent next suggests (Resp. Br. 24-34) that plan trustees can obtain the same relief that ERISA provides from the National Labor Relations Board (hereinafter "NLRB") and that requiring them to do so will not undermine the financial health of multiemployer plans or the ability of trustees to carry out their fiduciary duties. These suggestions are plainly wrong.

The NLRB cannot provide plan trustees with the full array of remedial measures provided by ERISA. To be sure, the NLRB's remedial discretion is quite broad, and, in the exercise of this broad discretion, the NLRB may require delinquent employers to pay trust funds the investment income that has been lost due to delinquencies, the administrative costs that have been incurred in collection efforts, and the liquidated damages that are provided for in many plan documents. *See, e.g., Stone Boat Yard*, 276 N.L.R.B. 1185, 1189 & n.10 (1985). But, in the absence of an authorizing provision in the plan documents, the NLRB cannot award either the "double interest" or the liquidated damages authorized by Section 502(g)(2) of ERISA, 29 U.S.C. § 1132(g)(2). *See G.T. Knight Co.*, 268 N.L.R.B. 468, 470 (1983); *Merryweather Optical Co.*, 240 N.L.R.B. 1213, 1216 n.7 (1979). Moreover, the NLRB can award attorneys' fees and costs only

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extraordinary pre-emptive power of Section 301 of the LMRA, nothing in either *Dedeaux* or *Taylor* suggests that the duty imposed on an employer by Section 515 of ERISA is limited to contractual obligations to contribute, as Respondent contends. Indeed, as noted in the brief *amicus curiae* of the United States (at 14 and 26), this Court's statements in *Dedeaux* concerning statutory interpretation and the civil enforcement scheme of Section 502(a) of ERISA are consistent with the approach taken by Petitioners and the United States as *amicus curiae*.

in "extraordinary" circumstances (*H. Treffinger Repair Services, Inc.*, 281 N.L.R.B. No. 85, slip op. 2 n.3 (1986)), i.e., where a "frivolous" defense has been interposed (see *Heck's, Inc.*, 215 N.L.R.B. 765, 765-67 (1974)), or where there has been extreme intransigence in flouting a judicially-approved NLRB order (see, e.g., *J.P. Stevens & Co., Inc.*, 244 N.L.R.B. 407, 458-59 (1979), *enf'd*, 668 F.2d 767, 777 (4th Cir. 1982)). Indeed, in *G.T. Knight*, the NLRB held that it could not award attorneys' fees against a delinquent employer even though the trust agreement required that such fees be paid in the case of delinquencies; the NLRB said that it "has no authority to require payments to be made under a contract as such. It is only when a contract breach undermines the collective-bargaining relationship in such a way that there is a refusal to bargain in violation of Section 8(a)(5) of the Act that the Board can find a violation and give a remedy" (268 N.L.R.B. at 470-71).

In any event, requiring plan trustees to rely upon the NLRB's *discretionary* remedial powers will in fact undermine both the financial health of multiemployer plans and the ability of plan trustees to carry out their fiduciary duties. ERISA provides that all employee service performed while an employer is obligated to make contributions to a plan must be credited to the employees, regardless of the source of the employer's contribution obligation, and regardless of whether the employer actually makes the required contributions. See 29 U.S.C. § 1053(b)(1)(G); see also Pet. Br. 34 & n.27; U.S. Br. 22 & n.15. Thus, plan trustees must be able to *compel* payment of delinquent contributions and reimbursement of associated administrative, investment, and litigation costs from employers if they are to maintain the financial health of the plans and effectively to carry out their fiduciary duties. For the reasons explained in our opening brief (at 28-35) and in the brief *amicus curiae* of the United States (at 23-26), only ERISA's *mandatory* remedies are suited to this task.

**IV. Vesting District Courts With Concurrent Jurisdiction To Decide Claims By Trustees Of Multiemployer Plans Concerning Delinquencies Arising From NLRA-Based Contribution Obligations Will Not Undermine Either The NLRA's Comprehensive Administrative Enforcement Scheme Or The Congressional Purpose In Enacting Section 515.**

Respondent also argues (Resp. Br. 34-41) that vesting district courts with concurrent jurisdiction to decide whether an NLRA-based contribution obligation exists will undermine the NLRA's comprehensive administrative enforcement scheme and, concomitantly, will frustrate the Congressional purpose motivating Section 515's enactment. These arguments are also without merit.

As explained in our opening brief (at 25-26) and in the brief *amicus curiae* of the United States (at 10-12), although the NLRA primarily relies on administrative enforcement to ensure uniformity and consistency of decision, Congress has in particular instances established judicial remedies for violation of NLRA-based rights. Our argument is that Section 515 of ERISA is one of those occasions. In Section 515 of ERISA, Congress has expressed its judgment that the NLRA's general concern for uniformity and consistency of decision is outweighed by ERISA's more specific concern for the protection of the special needs and interests of the participants and beneficiaries of multiemployer employee benefit plans and, accordingly, has created a judicial remedy for the enforcement of employer contribution obligations, including those arising out of the duty under Section 8(a)(5) of the NLRA to honor the terms of an expired collective bargaining agreement. While this judicial remedy may result in a small degree of inconsistency or nonuniformity in NLRA decision making, it will do so only because Congress has determined that judicial enforcement of these rights serves larger objectives.<sup>2</sup>

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<sup>2</sup> Of course, district courts adjudicating such cases should still look to NLRB case law in deciding whether any NLRA-based con-

That Congress authorized trustees, arbitrators, and courts to make these determinations when necessary to assess and collect withdrawal liability (29 U.S.C. § 1392 (a)) is indicative of this Congressional judgment. To be sure, as Respondent notes (Resp. Br. 37-40), trustees, arbitrators, and courts do not actually assume jurisdiction in withdrawal liability actions to determine whether an unfair labor practice has been committed. But they do decide whether any NLRA-based contribution obligation exists—*i.e.*, whether an impasse exists, whether a unilateral change has occurred, and whether the employer has any defensible reasons for making the unilateral change. *See, e.g., Woodward Sand Co. v. Western Conference of Teamsters Pension Trust Fund*, 789 F.2d 691, 695 (9th Cir. 1986); *I.A.M. National Pension Trust Fund v. Schulze Tool and Die Co.*, 564 F. Supp. 1285, 1289-96 (N.D. Cal. 1983); *Garland Coal Co.*, 7 Employee Benefits Cas. (BNA) 1771, 1779-82 (Dreyer, Arb. June 10, 1986); *Marvin Hayes Lines, Inc.*, 8 Employee Benefits Cas. (BNA) 1834, 1840-44 (Weckstein, Arb. March 16, 1987); *E.A. Nord Co.*, 8 Employee Benefits Cas. (BNA) 2171, 2175-77 (Axon, Arb. April 11, 1987).<sup>3</sup>

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tribution obligation exists and should exercise their discretion to determine whether or not their proceedings should be stayed when an NLRB judgment with respect to the specific issue presented will soon be forthcoming and the trustees of the multiemployer plan had an adequate opportunity to litigate the issue in the NLRB proceedings. *See Northern California District Council of Hod Carriers v. Opinski*, 673 F.2d 1074 (9th Cir. 1982). Moreover, district courts should sensitively employ the rules of joinder (Fed. R. Civ. P. 19), transfer (28 U.S.C. § 1404(a)), consolidation (Fed. R. Civ. P. 42), and res judicata/collateral estoppel to ensure that the exaggerated parade-of-horribles discussed in the brief *amicus curiae* of the Chamber of Commerce (at 8-11) do not result.

<sup>3</sup> Respondent incorrectly asserts (Resp. Br. 39 n.32) that under Section 4218 of ERISA, 29 U.S.C. § 1398, “the mere existence of a ‘labor dispute’ . . . is sufficient to prevent a withdrawal” and that “withdrawal liability disputes in the context of a labor dispute require the court to decide *only* whether a labor dispute exists, not

The identical decision must be made by courts in Section 515 actions. Thus, while the effect of the decisions differs, the inroad on the NLRB's exclusive authority to interpret the NLRA, and the concomitant inconsistencies, if any, that result in labor law doctrine from concurrent district court adjudication of these questions, is the same.<sup>4</sup>

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the subtle question of whether and when an impasse was reached." (Emphasis in original.) While Section 4218(2) provides that "an employer shall not be considered to have withdrawn from a plan solely because . . . an employer suspends contributions under the plan during a labor dispute involving its employees" (29 U.S.C. § 1398(2)), Section 4218 does not protect an employer whose obligation to contribute has permanently ceased, and, accordingly, a withdrawal may occur regardless of whether a labor dispute continues to exist. See 126 Cong. Rec. 23038 (1980) (remarks of Rep. Thompson); PBGC Op. Letter 86-4 (Feb. 28, 1986); *Schulze Tool*, 504 F. Supp. at 1295-96; *Garland Coal Co.*, *supra*; *Marvin Hayes Lines, Inc.*, *supra*; *E. A. Nord Co.*, *supra*. In addition, Section 4218(2) of ERISA, by its terms, addresses only the issue of whether an employer "shall . . . be considered to have withdrawn from a plan." Section 4218(2) does not define the date of a withdrawal which has been determined to have taken place. Once a complete withdrawal has been determined to have taken place, the date of the complete withdrawal is governed by Section 4203(e) of ERISA, 29 U.S.C. § 1383(e), which provides: "For purposes of this part, the date of a complete withdrawal is the date of the cessation of the obligation to contribute or the cessation of covered operations." Thus, "the date of the withdrawal is the date on which the employer ceased to have an obligation to contribute . . . even if, as is the usual case, that date is not the date on which Section 4218(2) of ERISA [the labor dispute exemption] ceased to apply to the employer." PBGC Op. Letter 86-4 (Feb. 28, 1986). See *Garland Coal Co.*, *supra*; *Marvin Hayes Lines, Inc.*, *supra*; *E.A. Nord Co.*, *supra*. Thus, even when a withdrawal liability dispute occurs in the context of a labor dispute, a court may have to decide whether any NLRA-based contribution obligation exists.

<sup>4</sup> Contrary to Respondent's suggestion (Resp. Br. 39 n.31), cases involving the issue of when the obligation to contribute ceased are not "historical anomalies" and will recur. Even though the initial cases have concerned the effective date of ERISA's withdrawal liability provisions, the date of an employer's withdrawal will continue to be a pivotal issue in cases where an employer seeks to take

Moreover, Respondent simply errs in suggesting that district court adjudication of claims by the trustees of multiemployer plans concerning delinquencies arising from NLRA-based contribution obligations will undermine the Congressional purpose in enacting Section 515. As noted above, Congress enacted Section 515 to provide trustees with a single, efficient cause of action for collecting delinquent contributions in order to promote the financial health of multiemployer plans; allowing trustees to seek recovery of delinquencies arising from NLRA-based contribution obligations will promote this purpose. To be sure, since an employer may have defenses to the trustees' claim that an NLRA-based contribution obligation exists,<sup>5</sup> a collection action of this sort may be more complicated than a collection action involving a simple contractual

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advantage of changes in the plan's funding status which would significantly affect its withdrawal liability. See, e.g., *Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 827 F.2d 491 (9th Cir. 1987); *Garland Coal Co.*, *supra*. In addition, the issue of when the obligation to contribute ceased may arise in other contexts under ERISA. For example, in *Southwest Administrators, Inc. v. Rozay's Transfer*, 791 F.2d 769, 776-77 (9th Cir. 1986), the employer filed a counterclaim under Section 403(c)(2)(A)(ii) of ERISA, 29 U.S.C. § 1103(c)(2)(A)(ii), seeking to recover contributions which it alleged were mistakenly made to the trust fund after the old collective bargaining agreement had expired and before the new agreement was executed. The Ninth Circuit found that the contributions were not made mistakenly because the employer was obligated under Section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), to continue to make the contributions until the parties negotiated a new agreement or bargained in good faith to impasse, and the employer had not alleged that an impasse had been reached in negotiations with the union.

<sup>5</sup> Respondent's suggestion (Resp. Br. 37 n.29) that a serious question exists concerning whether an employer may raise such NLRA-related defenses in a Section 515 action is plainly wrong; this Court has said that defenses directed to the obligation to contribute, though not to collateral matters, must be entertained. See *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86, 88 (1982).

contribution obligation. But this Court has said that adjudication of such complexities is not inconsistent with Section 515's purpose; Congress intended that any defenses directed to the obligation to contribute would be adjudicated in a Section 515 action. *See Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 86-88 (1982).<sup>6</sup>

**V. In Determining Whether Congress Intended To Create An Independent Mechanism For The Enforcement Of an NLRA-Based Right, The Question Is Not Whether Congress has Expressed Its Intention With A Particular Degree Of Clarity, But Rather Whether The Relevant Interpretive Materials, Fairly Viewed, Indicate That Congress Intended To Create That Independent Mechanism.**

Finally, running through Respondent's brief is the suggestion (Resp. Br. 12-13, 18-19, 34-37) that Congress must clearly and manifestly express its intention to create an exception to the NLRB's general primary jurisdiction over NLRA-related questions before such an exception may be recognized. We, of course, believe that the language, legislative history, and structure of Section 515 of ERISA satisfy Respondent's "clear and manifest" expression standard. But, more fundamentally, we agree with the brief *amicus curiae* of the United States (at 27-28) that Respondent's standard is wrong. The question is not whether Congress has expressed its intention with a particular degree of clarity; the question is whether the relevant interpretive materials, fairly viewed, indi-

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<sup>6</sup> Respondent errs in suggesting (Resp. Br. 40-41) that allowing district courts to entertain NLRA-related questions will result in the needless expenditure of plan assets. Allowing plan trustees to initiate such actions in federal court does not require them to do so; trustees retain the option of filing charges with the NLRB and of seeking collection of any delinquencies in that forum. *See* 29 U.S.C. § 160(b); 29 C.F.R. § 102.9. The trustees can determine which forum is likely to be the least expensive and most efficient; and their choice may be reviewed under well-established fiduciary standards.

cate that Congress intended to create an additional remedy for enforcement of NLRA-based rights. Thus, this Court has several times found exceptions to the NLRB's general primary jurisdiction without citing to any statement of Congressional intent explicitly supportive of such a finding; rather, the Court has found the intention to create an independent mechanism for enforcement of an NLRA-based right to be implicit in the particular statutory scheme in issue. *See, e.g., Kaiser Steel Corp. v. Mullins*, 455 U.S. at 83-86 (ERISA and LMRA); *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 626, 633-37 (1975) (Sherman Act); *Vaca v. Sipes*, 386 U.S. 171, 176-88 (1967) (LMRA). Analogously, this case presents the question of whether Congress has created an independent mechanism for the enforcement of an NLRA-based right in Section 515 of ERISA; the language, history, and structure of Section 515 of ERISA require an affirmative answer to that question.

### CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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